Supreme Court, U.S.
FILED

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

CHANDRASHEKHAR B. THANEDAR,

Petitioner

v.

TIME WARNER, INC., ET AL,

Respondents

On Petition For Writ of Certiorari
To The United States Court of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Chandrashekhar B. Thanedar
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QUESTIONS PRESENTED

1. Whether the Sarbanes-Oxley Act, 18 U.S.C. 1514A, explicitly refutes the application of common law preclusion principles to a whistleblower retaliation claim under Sec. 806 of the Act, and whether a court can mandate a complainant to remove his whistleblower retaliation claim to a federal court immediately after the statutory waiting period in conflict with Sec. 1514A(b)(1)(B) of Sarbanes-Oxley Act, especially when defendant opposes consolidation of claims or acquiesces to claim splitting?

2. Whether res judicata applies to a valid claim of unpaid wages?

3. Whether a district court has the power to enter preclusive order restricting or barring a party from future legal actions for any reason when a party's lawsuits have not been found to lack reasonable basis in law?

PARTIES TO THE PROCEEDINGS

A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Chandrashekhar B. Thanedar, and Time Warner, Inc., Time Warner Cable Inc., Texas and Kansas City Cable Partners, L.P., Time Warner Entertainment - Advance Newhouse Partnership, Time Warner Communications of Houston, L.L.P., and Time Warner Entertainment Company, L.P.

RULE 29.6 STATEMENT

Because Petitioner is not a corporation, corporate disclosure statement is not required under Supreme Court Rule 29.6.

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Petitioner Chandrashekhar B. Thanedar respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the United States court of appeals for the Fifth Circuit appears at Appendix A and is unreported. Following that opinion, the Fifth Circuit denied a petition for rehearing en banc, in an unpublished order which appears at Appendix B. The findings of fact and conclusions of law and the final judgment of the United States District Court for the Southern District of Texas appear at Appendices C and D to the petition and are unreported.

JURISDICTION

The court of appeals entered opinion on November 3, 2009 which is Appendix A and a timely petition for rehearing en banc was denied on December 3, 2009, a copy of which appears at Appendix B. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the First, Fifth and the Fourteenth Amendments to the United States Constitution, the Sarbanes-Oxley Act of 2002 (SOX), 18 U.S.C. Secs.1514A(b)(1)(B) and (d) and the Texas Labor Code, sections 61.001(7), 61.015, and 61.015(a)(1) and (b).

1) The First Amendment to the U. S. Constitution states in part that "(Congress shall make no law)...abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Constitutional Amendment I.

The Fifth Amendment of the United States Constitution provides in part that "(No person...shall) be deprived of life, liberty, or property, without due process of law...." U.S. Constitutional Amendment V. The Fourteenth Amendment of the United States Constitution provides in part that "...nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws." U.S. Constitutional Amendment XIV, § 1

2) The Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A(b)(1)(B) provides in part that:

> A person who alleges discharge or other discrimination by any person in violation of subsection (a) may seek relief by...
>
> (A) filing a complaint with the Secretary of Labor;
>
> or
>
> (B) if the Secretary has not issued a final decision within 180 days of the filing of the complaint...bringing an action at law, or equity for de novo review in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy.

3) The Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A(d) provides: "RIGHTS RETAINED BY EMPLOYEE-Nothing in this section shall be deemed to diminish the rights, privileges, or remedies of any employee under any Federal or State law, or under any collective bargaining agreement."

4) The Texas Labor Code, § 61.001(7) provides "'Wages' means compensation owed by an employer for: (A)

labor or services rendered by an employee, whether computed on a time, task, piece, commission or other basis."

5) The Texas Labor Code, § 61.015 provides: PAYMENT OF COMMISSIONS AND BONUSES.

(a) Wages paid on commission and bonuses are due according to the terms of: (1) an agreement between the employee and employer

.....

(b) An employer shall pay wages paid on commission and bonuses to an employee in a timely manner as required for the payment of other wages under this chapter.

STATEMENT OF THE CASE

Petitioner, Chandrashekhar B. Thanedar, held the position of Director of Finance and Manager of Accounting positions for Time Warner, Inc.'s largest cable operations in Houston, Texas and Los Angeles, California. He was employed by the Time Warner Companies (Time Warner) for 6 ½ years. Thanedar held the position of Director of Finance for Time Warner's Cable operations in Houston where his responsibilities included preparation and presentation of financial information, financial reporting, analysis, budgeting, subscriber statistics, and subscriber revenue and expenses - information which was reported to investors in Time Warner's public reports and legally mandated U.S. Securities and Exchange Commission (SEC) filings. During his employment at Time Warner, Thanedar received mostly "Exceeds Expectations" ratings on performance evaluations.

Thanedar's expressed concerns about Time Warner's accounting manipulation, financial irregularities and fraud in 2002-2004 amounting to millions of dollars in violation of the SOX. Thanedar's allegations were investigated by Time

Warner, Inc. and some were found to have validity according to an internal audit report by Time Warner, Inc. This investigative report was not shared with Thanedar.

During the same time period, Thanedar applied for Vice-President of Finance and Controller positions at different Cable operations of Time Warner throughout the country but was denied promotions and was denied equal pay for his position as a Director of Finance. Thanedar timely filed an EEOC complaint based on racial and national origin discrimination for failure to promote and failure to pay equal pay which was denied in July 2004. Thanedar was "Job Eliminated" three months later.

Thanedar was offered a severance package upon his "Job Elimination" by Time Warner, Inc. and its subsidiaries on October 22, 2004. Thanedar declined the severance package by Time Warner. Thanedar was not paid his bonus wages upon his job elimination. Petitioner filed a Title VII lawsuit against Time Warner on October 29, 2004 in the U.S. District Court for Southern District of Texas, Houston division for claims of failure to promote and failure to pay equal pay and which included petitioner's allegations of investor fraud. Petitioner timely filed his Sarbanes-Oxley Act (SOX) claim with Department of Labor's (DOL) Occupational Safety and Health Administration (OSHA) as required by the Sarbanes-Oxley Act, 18 U.S.C. 1514A(b), on or about January 18, 2005. This SOX claim was in administrative process with OSHA for more than a year with DOL/OSHA making a preliminary ruling in this matter on March 28, 2006. Petitioner timely filed his SOX federal lawsuit against Time Warner in June 2006.

During the pendency of petitioner's Title VII case, Thanedar moved the Title VII district court twice in July 2005 and August 2005, seven (7) months in advance of the jury trial, to allow him to remove his SOX Sec. 806 claim with DOL pursuant to 18 U.S.C. § 1514A(b)(1)(B) and

consolidate it with Title VII lawsuit. Both times, Time Warner in its written response opposed the consolidation of SOX with Title VII. Based on Time Warner's opposition, the district court denied consolidation of SOX claim. Subsequently, petitioner's Title VII lawsuit was dismissed pursuant to FRCP Rules 41(b) and 37(d). Following denial of appeals, Thanedar filed a petition for writ of certiorari with this Court which was denied in case no. 07-609.

Time Warner vigorously defended the separately filed SOX lawsuit for 2 years in the district court (Judge Hoyt), never filing a motion to dismiss based on res judicata. Judge Hoyt imposed sanctions on Thanedar, which he paid. District court (Judge Hoyt) granted deemed admissions to Thanedar due to Time Warner's conduct and failure to timely answer Thanedar's request for admissions (Appendix F) and denied Time Warner's motions to withdraw deemed admissions, for reconsideration, and for continuance. See Appendix G and Appendix H. District court imposed sanctions on Time Warner due to its failure to comply with discovery rules. Appendix E.

Two to three business days before the jury trial in petitioner's SOX case on May 27, 2008, the case was transferred to another judge (Judge Hittner) by agreement of judges. See Appendix J. On the eve of trial, the district court granted Time Warner's reurged motion to withdraw deemed admissions granted to Thanedar by Judge Hoyt and denied Thanedar's motion for continuance. The case went to trial – petitioner's SOX claim was tried to an advisory jury and the state law claims were tried to jury. The district court (Judge Hittner) at the end of all evidence granted Time Warner's Rule 50(a) oral motion on June 2, 2008 on all claims.

On October 7, 2008, four months after dismissing Thanedar's claims, the district court entered its findings of fact and conclusions of law, final judgment, and entered a preclusive order against Thanedar barring and restricting him

from filing any further legal actions in the matter without first obtaining permission from the Chief Judge of the U.S. District Court for the Southern District of Texas. Appendix C. Thanedar's motion to recuse Judge Hittner was denied.

The Fifth Circuit court of appeals denied Thanedar's appeal of the district court's decision in the SOX case in an unpublished opinion on November 3, 2009 based on Res Judicata bar of the previous Title VII judgment, finding that Thanedar was required to file his Sarbanes-Oxley lawsuit upon the expiration of the 180 day statutory waiting period in 18 U.S.C. § 1514A (b)(1)(B) to avoid preclusive effect of the Title VII judgment. The appeals court denied petitioner's Fed. R. App. P. (FRAP) 46(c) and 28 U.S.C. 1927 motion sanctions against Time Warner attorneys and Time Warner and Time Warner's FRAP 38 motion for damages from Thanedar. Appeals court affirmed district court's preclusive order and injunction stating that Thanedar used the word "lie," had discovery sanctions imposed on him, and insulted Time Warner's attorneys. The appeals court denied rehearing en banc on December 3, 2009.

REASONS FOR GRANTING THE WRIT

The SOX questions presented to the Court are issues of first impression before the Court. Petitioner's Sec. 806 whistleblower retaliation lawsuit under the Sarbanes-Oxley Act (SOX), 18 U.S.C. 1514A, was the first one in the country to go to a jury or bench trial in a federal court. The ad hoc decision by the fifth circuit applicable to petitioner is so far off the mark from the Sarbanes-Oxley Act and other circuit courts that it should be reviewed and reversed by this court.

The allegations of corporate fraud are of great importance to the public and advance important economic and public policy priorities. The lower court's unpublished decision applying res judicata to SOX in wrongful disregard to the plain language of the Sarbanes-Oxley Act is a hasty

conclusion that clearly conflicts with the Sarbanes-Oxley Act and the Congressional intent of enforcing corporate accountability. The lower court has deviated so far from this Court's and other circuits' decisions that this Court should therefore review and reverse the lower court decision.

Further, the appeals court applied, without explanation, Res Judicata bar to petitioner's valid and established claim of unpaid wages which conflicts with the plain language of Texas Labor Code Section 61.015(a) and is fundamentally unfair and unjust.

Fifth Circuit's created new law in dismissing petitioner's SOX claims and wage claim on res judicata. This court should review these matters of first impression.

I. SOX Sec. 1514A(d) specifically refutes common law principles of preclusion applied by appeals court in this case and thus its decision conflicts with SOX

Sec. 1514A(d) of SOX specifically provides: "RIGHTS RETAINED BY EMPLOYEE-Nothing in this section shall be deemed to diminish the rights, privileges, or remedies of any employee under any Federal or State law, or under any collective bargaining agreement."

The language is plain and unambiguous in providing that no other remedies e.g. provided in Title VII or other ant-discrimination statutes will diminish the rights, privileges, or remedies available to petitioner under SOX. Thus, the plain language of SOX provides that petitioner's rights, privileges, and remedies are over and above and in addition to all other rights, privileges, and remedies accorded to petitioner under other federal or state statutes. No limitation or restriction is imposed on an employee's rights under SOX. If Congress intended to impose or restrict the rights of an employee under Sec. 1514A(d), it would have done so, but it did not. Thus any further judicial inquiry is unnecessary and must yield to

the plain language of the Sarbanes-Oxley Act. *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003) "Where, as here, the statute's words are unambiguous, the judicial inquiry is complete." *Ibid*, at 91 (Internal citation omitted).

The appeals court in this case dismissed petitioner's appeal based on its finding that a prior judgment in petitioner's Title VII lawsuit barred petitioner's SOX claims. The plain language of SOX however shows that the appeals court lacked power to apply common law principles of preclusion, collateral estoppel and res judicata, to petitioner's statutory rights under SOX. Petitioner's remedies under SOX cannot be taken away by res judicata bar of a prior Title VII decision. Further, Sec. 1514A(d) explicitly refutes collateral estoppel and petitioner is entitled to determination of the merits of his claims on appeal under the Sarbanes-Oxley Act, not withstanding whether his Title VII discrimination claims have been previously decided or not. The appeals court erred and its opinion should be reviewed and reversed by this Court.

The Third Circuit Court of Appeals, in a similar case, has held that SOX Sec. 1514A(d) explicitly refutes collateral estoppel. See *Tice v. Bristol-Myers Squibb*, No. 07-3977, (3rd Cir. April 8, 2009). Even though the opinion in this case was non precedential, the panel concluded that SOX Sec. 1514A(d) explicitly refutes collateral estoppel. The panel majority (Judges Fuentes and Hardiman) agreed with the dissent (Judge Garth) in holding that:

"Although forcing litigants to strategically choose the most colorable among several competing theories of recovery might otherwise be a legitimate purpose of collateral estoppel, we agree that Sec. 1514A(d) refutes such intent in this case." *Tice v. Bristol Myers, id.* page 17

The panel majority in Tice specifically held that SOX was superior to Title VII because SOX contained a specific provision prohibiting collateral attacks on it. *Tice*, page 18.

Further, the Third Circuit has held that SOX Sec. 1514A(d) specifically allows a "mixed motive" plaintiff to proceed in two separate lawsuits against a defendant. The Third Circuit recognized that since discrimination need not be the sole motivating reason for mistreatment to trigger liability under anti-discrimination statutes, an alternative theory of proving discrimination is not subject to the common law principle of collateral estoppel. Thus, mixed motive theories are not subject to collateral estoppel under the Third Circuit precedents. See *Fuentes v. Perskie*, 32 F.3d 759, 764 (3rd Cir. 1994); *see also Miller v. CIGNA Corp.*, 47 F.3d 586, 593-94 (3rd Cir. 1995); *Wilson v. Susquehanna Twp. Police Dept.*, 55 F. 3d 126, 130 (3rd. Cir. 1995).

The Fifth Circuit decision in this regard conflicts with the Third Circuit as the Fifth Circuit did not recognize and did not apply the mixed motive analysis to petitioner's SOX claims dismissing petitioner's mixed motive claims for discrimination and termination of his employment based on the res judicata bar of prior Title VII judgment. See Appendix A, page 11. Further, petitioner has clearly made factual allegations of separate and uniquely identifiable whistleblower discrimination against him under Sec. 806. The lower court denied without analysis that facts, circumstances, people, and discrimination under SOX cannot be different than under Title VII which defies common sense. See Appendix A, page 10. Even if res judicata and collateral estoppel are not refuted by SOX, they are not applicable due to the unique nature of circumstances and prohibited discrimination under SOX.

Appeals court's decision conflicts with Third Circuit with respect to the above. This court should review Fifth Circuit's decision in this regard.

II. SOX §1514A(b)(1)(B) specifically refutes appeal court's opinion that petitioner was required to remove his SOX claim to federal court upon expiration of statutory waiting period, thus, its opinion should be reversed by this Court

In dismissing petitioner's SOX claims on res judicata, appeals court stated that Thanedar was required to remove and file his SOX lawsuit immediately after the expiration of the 180 days of statutory waiting period under 18 U.S.C.§1514A(b)(1)(B). See Appendix A, page 11. Such a requirement is in stark conflict with SOX and violates petitioner's statutory and constitutional rights.

The language of 18 U.S.C.§1514A(b)(1)(B) is plain and unambiguous in providing that it allows ("may seek relief") removing and bringing action in federal court on a Sarbanes-Oxley claim if the Secretary of Labor has not issued a final decision in 180 days. Nothing in the language makes it mandatory or requires an employee to remove the Sarbanes-Oxley claim immediately upon expiration of 180 days. To impose such a restriction on a complainant under the above provision conflicts with and defies intent of SOX. If Sec. 806 complainants were to be required to remove their SOX complaints immediately after the expiration of 180 days, it would make the entire DOL role in the SOX statutory process meaningless and irrelevant. Clearly, Congress had no such intent when it provided a significant role for DOL. See 18 U.S.C.§1514A; 29 CFR §1980.100-115 (Department of Labor SOX implementation procedures).

The Lower court went off track in conflict with other circuit courts and in conflict with DOL's significant role under SOX in the few years since the enactment of Sarbanes-Oxley Act of 2002. Such an unprecedented error should be corrected by this Court from imposing manifest injustice on petitioner and before it gains further currency. Appeals

court's unpublished decision singles out petitioner for imposition of this new law under 18 U.S.C.§1514A(b)(1)(B), thereby depriving him of economical adjudication of SOX under DOL and violates petitioner's constitutional rights under the Fifth and the Fourteenth amendments to the Constitution.

III. Time Warner consciously misrepresented to this Court its position regarding petitioner's SOX lawsuit when it filed its Brief in Opposition in case no. 07-609, its gamesmanship should not be rewarded

Respondent Time Warner comes with unclean hands before this Court as Time Warner has consciously misrepresented to this Court its position on the issue of consolidation of SOX with Title VII, in case no. 07-609 in petitioner's prior Petition for the Writ of Certiorari. Time Warner in its Brief in Opposition in case No. 07-609 stated:

> Second, petitioner asserted arguments related to his separately filed Sarbanes-Oxley case which had *no bearing on the present case.*

See Time Warner's Brief in Opposition (12/2007) to Thanedar's Petition for Certiorari case no. 07-609, **page no. 15** (emphasis added)

> Fourth, there is no evidence to show that the lack of consolidation [of petitioner's SOX claim] has violated Petitioner's due process rights or otherwise harmed him. As previously noted, Petitioner's Sarbanes-Oxley suit is *active and pending.*

See Time Warner's Brief in Opposition (12/2007) to Thanedar's Petition for Writ of Certiorari case no 07-609, **page no. 17** (emphasis added).

Time Warner's above Brief in Opposition is on file with this Court and the Court should take due notice of Time Warner's acquiescence of claim splitting and subsequent gamesmanship in claiming res judicata. Plain reading of the above clearly shows that Time Warner acquiesced to claim splitting but then took the opposite position in claiming res judicata defense after two years of SOX proceedings. Such gamesmanship and lack of veracity should not be countenanced by this Court.

IV. Appeals courts opinion conflicts with this Court's and other circuits' decisions and with principle of waiver of res judicata by acquiescence; Time Warner opposed consolidation of petitioner's claims

1. Appeals court's decision exonerated Time Warner from any obligation or responsibility from acting in consonance with the good intentions behind the common law principle of res judicata. Appeals court's decision in this case diametrically conflicts with the well settled principle of waiver of res judicata by acquiescence and opposition to consolidation of claims adopted by other circuits. It is axiomatic that the common law principle of res judicata is for the benefit of defendant from being harassed with repetitive lawsuits involving the same legal matters. However, a defendant cannot unreasonably obstruct and actively oppose consolidation of a plaintiff's claims with the dishonest intention of later claiming res judicata against the separately filed lawsuit. It is well settled that a defendant, upon put on notice by plaintiff of an additional claim, can waive the defense of res judicata by its conduct, opposition to consolidation of claims, or by agreement. See *Restatement (Second) of Judgments* §26(1)(a).

2. In this case, appeals court ignored the fact Thanedar filed two motions in the Title VII district court in July 2005 and August 2005 that squarely put Time Warner on notice that he had a SOX Sec. 806 claim against the defendant Time

Warner companies and his intention to consolidate it with his Title VII pending lawsuit more than 7 months before trial date on February 13, 2006. Appendix I. Thanedar's "Motion to Defer Proceedings and Reset Scheduling" filed with the Title VII district court on July 27, 2005 put Time Warner **on notice 7 times** that Thanedar intended to remove and consolidate his SOX claim into the Title VII lawsuit. Petitioner in his Motion to Defer Proceedings and Reset Scheduling stated in part:

> 7. The SOX [Sarbanes-Oxley Act of 2002] case no. 6-3280-05-904 mentioned above [filed on January 18, 2005 and supplemented on January 19, 2005] involves 26 charges of accounting and internal control irregularities and manipulation of financial statements and statistical reporting which affected shareholders' interests and violated relevant rules and regulations of regulatory bodies.
>
> 8. *Movant wanted to before, and still wishes to remove the SOX case to the federal court as provided for by the Sarbanes-Oxley Act of 2002 and consolidate his claims against the Time Warner defendant companies.*
>
> 9. The complaint (C.A. No. H-04-4188) filed with this Court on October 29, 2004 includes charges of accounting problems, irregularities, and manipulations affecting shareholders' interests.

Appendix I (Motion to Defer proceedings and Reset Scheduling) Emphasis added.

The Appendix I above unambiguously put Time Warner on notice of petitioner's intent to file a SOX lawsuit and his intent to consolidate it. See Appendix I. Petitioner correctly

styled the motion to "Defer proceedings and Reset Scheduling" to allow sufficient time to remove the SOX claim from DOL's Administrative Law Judge's (ALJ) jurisdiction and consolidate the claim with Title VII by amending the Title VII lawsuit. Pursuant to 29 CFR 1980.114(b), removal of SOX claim to federal court requires a 15 days notice to the ALJ. Further, it would have taken additional time to prepare and file the amended complaint consolidating SOX and Title VII claims. On August 10, 2005 petitioner filed a motion supplementing the motion filed on July 27, 2005 repeating arguments regarding consolidating SOX claims. Thanedar contends that he correctly styled the motion as a motion to defer proceedings and to reset scheduling as it fully complies with circuit courts decisions.

3. Fifth Circuit's decision conflicts with several Circuit courts that have held that a plaintiff is not required to abandon the administrative process to avoid the effect of res judicata but must put the defendant on notice and move to abate or defer proceedings in the first lawsuit which is exactly what Thanedar did. See e.g. *Woods v. Dunlop Tire Corp.*, 972 F.2d 36 (2nd Cir. 1994); *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 714-15 (9th Cir. 2001); *Hermann v. Cencom Cable Assocs., Inc.*, 999 F.2d 233, 225-26 (7th Cir. 1993); *cf. Boateng v. InterAmerican Univ., Inc.*, 210 F.3d 56, 63 (1st Cir. 2000). Thanedar met his burden under law as he put Time Warner on notice that he intended to consolidate the SOX claims with his Title VII claim. Thanedar has no further responsibility under the law but to put Time Warner on notice of his SOX claim, move the court to defer proceedings, and require sufficient time to consolidate the claims. This Court has never exalted form over substance. Thus, whether the title of petitioner's said motion is technically correct or not is irrelevant as the defendant correctly understood petitioner's said motion and opposed the SOX claim's consolidation with Title VII lawsuit. See below.

4. Time Warner specifically opposed petitioner's above motions and the consolidation of SOX and Title VII claims. Time Warner in its written opposition to Thanedar's Motion to Defer proceedings and Reset Scheduling stated:

> *First there is no claim in the current lawsuit under the Sarbanes-Oxley Act of 2002 and the deadline for amending pleading has passed...A request for delay simply for the sake of delay should not be granted.*

Time Warner's "Response and Opposition to Plaintiff's Motion to Defer Proceedings and Reset Scheduling" was filed on August 12, 2005; 5th Circuit SOX Appellate Record at R:2224

5. On August 12, 2005, when Time Warner specifically opposed SOX consolidation because of the "deadline for amending has passed" and due to concern for "delay," it forfeited and waived the defense of res judicata. Whether Thanedar wanted additional time for replacing his attorney or his complaints about his attorney are beside the point and, in deed, irrelevant. Further, Time Warner never filed a motion during the pendency of the Title VII lawsuit, to require petitioner to consolidate or amend his Title VII lawsuit upon being put on notice on July 27, 2005 that petitioner had a SOX legal claim and that he intended to file a SOX lawsuit against Time Warner. The only issue here is whether Time Warner was on notice of Thanedar's SOX legal claims and whether they opposed the amending or consolidating SOX into Thanedar's Title VII lawsuit. The answers to both questions are unambiguously YES. Thus, Fifth Circuit's decision clearly conflicts with other circuits that have held that defendants by their action or conduct, whether express or implied, waive the defense of res judicata.

6. Petitioner gave Time Warner notice of his SOX legal claim seven months before the trial date of petitioner's Title VII lawsuit. The seven months notice was more than adequate and would not have caused substantial trial delay. Time Warner chose to oppose SOX consolidation with the Title VII claim. The reason for its opposition is irrelevant as it is indisputable from above that Time Warner was on notice and was offered the choice to agree to consolidate petitioner's SOX claim with his Title VII claim. Time Warner made the choice of claim splitting, not petitioner. Equally importantly, the fact that Time Warner opposed granting Thanedar additional time to replace counsel is also irrelevant in this SOX appeal. As clearly shown above, Time Warner was opposed to consolidating petitioner's SOX claim in addition to its opposition to continuance to replace counsel. Time Warner obstructed orderly consolidation of Thanedar's legal claims in this matter and forfeited the defense of res judicata.

7. The appeals court refused to rule on whether Time Warner's conduct was antithetical to the purpose of res judicata and whether Time Warner was put on notice by Thanedar in the Title VII case that he intended to consolidate his SOX claim with Title VII claim and whether Time Warner opposed the consolidation of petitioner's SOX claim. Instead the appeals court cursorily brushed aside the above questions without proper legal analysis.

V. Appeals court's refusal to adopt the principle of waiver of res judicata by conduct conflicts with this court and other circuits; Time Warner "Slept on its Rights."

Appeals court's refusal to rule on whether Time Warner's vigorous defense against Thanedar's SOX claim before DOL/OSHA and before 2 federal courts for 3 ½ years squarely conflicts with other circuit courts' adoption of the well settled principle that a defendant can waive res judicata by its conduct whether express or implied.

In this case, Time Warner slept on its rights for 3 ½ years before waking up to claim res judicata and thus has waived the res judicata defense. This Court has held that a party must protect such a right and must "avail itself of the remedy it had to preserve its rights" by taking timely action or lose the right. Concerning waiver of res judicata by acquiescence, in *United States v. Munsingwear, Inc.*, 340 U. S. 36 (1950), this Court held:

> The United States could have protected its rights by moving in the Court of Appeals to vacate the judgment below and remand with a direction to dismiss. Having **slept on its rights** by failing to do so, it cannot obtain relief in this Court... Pp. 340 U.S. 39-41. (Emphasis added.)

It is undisputed that Time Warner was on notice of petitioner's SOX claim from the time it was timely filed in January 2005 with OSHA/DOL. As shown above Time Warner opposed the consolidation of petitioner's SOX claim in the pending Title VII claim. Time Warner never filed a motion to dismiss in the 3 ½ years of pendency of the SOX claim. Time Warner produced thousands of pages of documents, answered interrogatories, took deposition of Thanedar, produced several former employees for depositions, Thanedar took depositions of two former employees of Time Warner, vigorously defended itself in the trial of this case before jury. Time Warner only filed a motion for summary judgment partially based on res judicata 2 months before jury trial in this case. District courts (Judge Hoyt and Judge Hittner) denied Time Warner's the summary judgment motion. Time Warner's actions and conduct, express and implied, in the 1 ½ years of DOL/OSHA proceedings and additional 2 years of pendency of the SOX lawsuit clearly amount to acquiescence of claim splitting and thus Time Warner waived the defense of res judicata.

Fifth Circuit's decision directly conflicts with at least Five Circuit Courts of Appeal that hold that a defendant who is put on notice of plaintiff's second claim and his or her intention to consolidate it with the first one and (defendant) fails to object to claim splitting, or opposes consolidation, or acquiesces by its conduct, express or implied, waives the defense of res judicata. See *Diversified Foods Inc. v. First Nat'l Bank of Boston*, 985 F.2d 27 (1st Cir. 1993); *Keith v. Aldridge*, 900 F.2d 736 (4th Cir. 1990); *Torres v. Rebarchek*, 814 F.2d 1219 (7th Cir. 1987); *Kern Oil & Ref. Co. v. Tenneco Oil Co.*, 840 F.2d 730 (9th Cir. 1988); and *Klipsch, Inc. v. WWR Tech., Inc.*, 127 F.3d 729, 734 (8th Cir. 1997).

Further, appeals court's unpublished opinion is arbitrary and unreasonable and singles out petitioner for a disparate treatment against its own precedents in *Davis v. Dallas Area Rapid Transit*, 383 F.3d 309 (5th Cir. 2004) and *Super Van v. San Antonio*, 92 F.3d 366, 371 (5th Cir. 1996) violating petitioner's constitutional rights of due process and equal justice under law.

VI. Congress intended SOX claims to be heard on merits and Petitioner did not have full and fair opportunity to litigate his SOX and State Law claims on appeal

By enactment of Sarbanes-Oxley Act of 2002, the United States Congress specifically intended to encourage employees who have knowledge of corporate fraud against investors to avoid Enron type catastrophic failures from endangering economic stability of this country, encourage employees to come forward and become whistleblowers to break the silence of corporate fraud. Congress intended the economical administrative process of hearing before OSHA to make it easy for whistleblowers to come forward. Congress clearly intended that a Sec. 806 whistleblower complaint must be heard either before the OSHA/ DOL or before federal court if the SOX complaint is removed to the

federal court. SOX Sec. 1514A(d). As Congress intended that the merits of the Sec. 806 complaint must be heard, res judicata from a Title VII judgment cannot be applied to SOX claims to avoid hearing on appeal of Sec. 806 SOX claims under the Sarbanes-Oxley Act of 2002. Even assuming that res judicata effect from his Title VII judgment applies to his SOX claims, petitioner did not have a full and fair opportunity to litigate his Sarbanes-Oxley claims. Because his Title VII claim was dismissed on tangential issues of Fed. R. Civ. Pro. Rules 41(b) and 37(d), petitioner's claims of SOX discrimination under Sec. 806 of SOX were never heard and decided on appeal. The extraordinary purpose and important public policy reasons of the Sarbanes-Oxley Act requires that the appeals court must decide the SOX issues on appeal.

As appeals court dismissed petitioner's appeal on res judicata alone, petitioner is entitled to a hearing and decision on the merits of his SOX claims before the appeals court. Petitioner did not have a full and fair opportunity on his SOX claims on appeal.

VII. Res judicata is not applicable to a valid claim of unpaid wages

The appeals court in this case applied the bar of res judicata of a Title VII judgment on race and national origin discrimination to promote and pay equal pay to petitioner's valid claim of unpaid wages. A court lacks power to deny a valid claim of unpaid wages. A claim of unpaid wages cannot be barred by a previous Title VII race discrimination judgment. Appeals court failed to state authority before depriving petitioner of earned wages. Petitioner has a fundamental right and a constitutional right to be paid for work performed for Time Warner and a court lacks power to deny wages petitioner has established, earned and are due. Petitioner has a property right in his earned wages that Time Warner owes him and the wages must be paid unless Time

Warner specifically shows evidence that it has paid the wages in question or that it has complied with Texas Labor Code §61.015(a) in showing evidence that Thanedar agreed to non-payment of wages.

Further, petitioner has a statutory right to be paid for the work performed for Time Warner under Texas Labor Code §61.015 which defines bonus as wages under the Texas law. See Texas Labor Code §§61.001(7) and 61.015. It is not disputed that petitioner completed work assigned by Time Warner to earn a bonus of about $25,000 for the year 2004. Under the Texas Labor Code bonus is defined as "wages" and must be paid pursuant to the agreement between the employee and employer. Texas Labor Code §61.015(a). Agreement between an employee and employer is the **only** condition for non-payment of bonus under Texas Labor Code. *Ibid.* In this case, it is undisputed that Time Warner failed to show evidence that Thanedar knew or agreed to any provision of non payment of bonus. It is well established that it is employer's burden, here Time Warner's, to show that employee (Thanedar) agreed to certain provision under which earned bonus may not be paid. Time Warner failed to carry its burden. Whether Thanedar was "**subject**" to any such provision is irrelevant as a matter of law as Time Warner failed to show Thanedar agreed to such provision.

There simply is **no authority in res judicata jurisprudence** where a court or a circuit court of appeals has used a common law preclusion principle such as res judicata from an unrelated legal matter, here Title VII race discrimination case, to justify barring a valid claim of unpaid wages.

In any case, it is abundantly clear and makes common sense that Title VII race discrimination claim and unpaid bonus wages do not have and need not have the same "nucleus" of operative facts or circumstances, making res judicata inapplicable in this case. Even assuming same

nucleus of operative facts, wages cannot be barred by res judicata, as the payment wages constitutes an extraordinary reason why res judicata should not apply considering that right to earned wages is a fundamental and constitutional right of a person. See e.g. Restatement of (Second) of Judgments, [Sec] 26(1)(f). In addition, Time Warner waived its defense of res judicata by its acquiescence as explained above.

Even assuming, arguendo, res judicata applies to petitioner's unpaid wage claim, petitioner contends that the appeals court did not apply Texas Law on issue preclusion to Thanedar's state law complaints of non-payment of earned wages and breach of contract. The Texas Supreme Court has adopted the RESTATEMENT (SECOND) OF JUDGMENTS on issue preclusion. *Sysco Food Service, Inc. v. Trapnell*, 890 S.W.2d 794, 801 (Tex. 1992). "A party seeking to assert the bar of collateral estoppel must establish "the elements of this defense." [1] *Sysco Food*, 890 S.W. 2d at 801. It is undisputed that elements 3, 4, 5, 6, and 7 were not met in Thanedar's Title VII lawsuit e.g. Thanedar's non-payment of wages and breach of contract were actually not litigated and the issue of fact or law decided in the prior action were not identical in the second action with respect to state law claims. Further, Title VII judgment does not preclude the failure to pay wages claim as the facts in the failure to pay earned wages are entirely different from Title

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[1] These elements are 1) The party against whom the doctrine is asserted was a party to the prior action, or in privity with a party to the prior action; 2) The parties were cast as adversaries in the prior action; 3) The issue of fact or law decided in the prior action was identical to the issue in the second action; 4) The opposing party had a full and fair opportunity to litigate the issue in the prior action; 5) The issue was actually litigated in the prior action; 6) The facts sought to be litigated in the second action were fully and fairly litigated in the prior action; 7) Those facts were necessary, essential, and material to the outcome of the prior action; and 8) A valid and final judgment on the merits were rendered in the prior action. *Sysco Food*, 890 S.W. 2d at 801

VII facts because payment of earned bonus wages is required whether Thanedar was "job eliminated", "terminated for cause," or suffered retaliation or not.

A common law principle of res judicata cannot be used to deprive a person of wages that are due according to state law. There is simply no authority among circuit courts or this court to deny a person's unpaid wages under a hasty generalization of res judicata. This arbitrary and unreasonable ruling of the Fifth Circuit should be reviewed and reversed before it gains currency.

VIII. District court's preclusive order barring and restricting petitioner's future legal actions conflicts with this Court's opinion, and is unconstitutional

1. *Appeals court's opinion conflicts with the Supreme Court's opinion in BE&K Construction Co. case as petitioner's lawsuits are reasonably based in law*

Appeals court affirmed the district's preclusive order and the pre-filing injunction against Thanedar barring and restricting all his future legal actions against defendants. Appeals court's opinion squarely conflicts with this Court's opinion in *BE&K Construction Co v. NLRB*, 536 U.S. 516, 524 (2002) and is unconstitutional as it violates Thanedar's due process rights and First Amendment right under the Constitution, and further doing so without notice. Courts are exceedingly reluctant to use preclusive order, because

> The First Amendment Right to petition the Government for a redress of grievances – which includes the filing of lawsuits – is "one of the most precious liberties safeguarded by the Bill of Rights."
>
> *BE&K Construction Co v. NLRB*, 536 U.S. 516, 524 (2002) (quoting *United Mine*

Workers v. Illinois Bar Assn., 389 U.S. 217, 222 (1967)).

In *BE&K Construction*, this Court held that "reasonably based, but unsuccessful lawsuits" cannot be penalized due to First Amendment protection as even unsuccessful, but reasonably based suits advance First Amendment interests.

The record is undisputed that Thanedar's Title VII and SOX lawsuits are well pled and reasonably based in law. In addition, a Title VII lawsuit serves important societal policy objectives of promoting equal opportunity and help diminish racial and national origin discrimination in the country. Similarly, a SOX lawsuit promotes national policy objective of exposing corporate fraud, promote corporate accountability and economic stability. Neither the court of appeals nor the district court has found that petitioner's lawsuits were not reasonably based in law. Thus, lower court's opinion conflicts with this court's opinion and analysis in *BE&K Construction* case.

This Court should review appeals court's opinion in this case and reverse district court's wrongful disregard for constitutional rights of Thanedar.

2. District court's citation of its cases are inapplicable to petitioner's case

The district court cited its cases - *Kaminetzki v. Frost Nat'l Bank*, 881 F. Supp. 276, 278 (S.D. Tex. 1995) and *Farguson v. MBank Houston, N.A.*, 808 F.2d 358 (5th Cir. 1986) in support of its preclusive order restricting Thanedar's constitutional right to seek redress of grievances. However, these cases don't apply to Thanedar's case as Kaminetzki and Farguson lawsuits were found to be without legal basis and, indeed, irrational. For example, Farguson's lawsuit was found to be irrational as Farguson claimed he only owed 5%

of the loan to the bank and the remaining 95% to be illegal artificial credits and claimed that 95% of the loan he took out need not be repaid to the bank.

In this case, petitioner's lawsuits were not only reasonably based in law, but in fact, greatly advance public policy goals of the citizens and the country. The plain fact is that the SOX proceedings lasted more than 3 ½ years, before Department of Labor and OSHA and two federal judges, in this case, with both parties vigorously prosecuting the issues. A res judicata bar (twice denied before) applied at the end of the jury trial does not make this lawsuit of first impression "frivolous" or "vexatious." Petitioner's unsuccessful Title VII and SOX lawsuits do not become frivolous because of the lack of success. See *BE&K Construction, Id.* Nor could district court or appeals court make such a determination.

3. District court lacks power to deprive petitioner of his constitutional rights for its general complaints and displeasure about petitioner

While it is recognized that the district court has discretion over the proper conduct of the courtroom and can sanction a party, there simply is no authority for the proposition that a district court has the power to deprive, deny, or restrict a party's, here petitioner's, constitutional rights without proper legal analysis of why the benefit of such deprivation outweighs petitioner's constitutional rights. In *BE&K Construction* case, this Court stated that a party's constitutional right may not be taken away by a court unless its lawsuit does not have a reasonable basis in law. Neither the court of appeals nor the district court made such a finding. Instead, the district court abused its discretion by merely applying unreasonable labels to Thanedar, basing its preclusive order, imposed without prior notice, due to its displeasure and general complaints about Thanedar. In doing so, the Fifth Circuit disregarded its own precedent in *Goldin v. Bartholow*, 166 F.3d 710,722-23 (5th Cir.1999) in which it

held that sanctions are not appropriate for general complaints and that sanctions on a party are not appropriate without prior notice.

Petitioner's SOX case was transferred to Judge Hittner after being in Judge Hoyt's court for almost two years. Judge Hittner presided over this case for a total of about five days. District court's complaints against Thanedar are as follows:

a. The district courts' general complaint about petitioner includes the complaint that Thanedar insulted Time Warner attorneys by using the word "lie" when expressing concern about Time Warner's attorney's veracity and knowing misrepresentation before the court in an evidentiary hearing specifically conducted to determine whether Time Warner attorneys knowingly made false statements to the court. Petitioner submitted unimpeachable United States Post Office documents and proof to show that Time Warner's attorney's contentions were false and that he knew it. Petitioner's opinion that Time Warner attorneys lied to the district court is properly supported by independent evidence from the U.S. Post Office and the tracking of defendants' mail sent to petitioner. Further, petitioner's opinion that Time Warner attorneys "lied" is protected under the First Amendment to the U.S. Constitution. District court (Judge Hittner) sought to control what Thanedar could think and speak in the evidentiary proceeding regarding whether Time Warner's attorney had knowingly made false statements to the previous district court (Judge Hoyt). District court's no notice preclusive order based on this impermissible censorship of words Thanedar could use was a violation of Thanedar's First Amendment freedom under the Constitution. Justice Anthony Kennedy wrote:

> First Amendment freedoms are most in danger when the government seeks to control thought or to justify its laws for that impermissible

> end. The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002)

This Court ruled in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), that opinions could not be considered defamatory. Thus it is permissible to suggest that someone is a bad lawyer. This is more relevant especially when the context is an evidentiary hearing where evidence was presented and heard as to whether Time Warner attorney knowingly misrepresented defendants' compliance with discovery rules obstructing discovery and depriving petitioner evidence to present his case. By presenting irrefutable U.S. Postal Service's tracking and mail markings on defendants' envelope in the evidentiary hearing, petitioner had also met the higher standard this Court set for First Amendment protection for "opinion" in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990). Thus, "Insulting Time Warner's Attorneys" cannot be the basis for the no notice preclusive order depriving petitioner of another First Amendment right to petition the government for a redress of grievances. This Court has interpreted "redress of grievances" broadly and held that the right to petition the government extends to all three branches: the Congress, the executive, and the judiciary. *BE&K Construction Co., Id.*

The district court singled out Thanedar for the preclusive order ignoring Time Warner attorneys' well documented coarse and crude conduct that included calling Thanedar nonsensical, laughable, and engaging in improper conduct during the taking of Thanedar's deposition boasting that the Time Warner attorney was going to do "Shock and Awe" on Thanedar and improperly contacting a court reporter Thanedar had hired for deposition of Time Warner employees to make incorrect allegations against Thanedar in a motion filed with Judge Hoyt's court. Judge Hoyt who had

this case for about two years sanctioned Time Warner for not supplementing its disclosures per Fed. R. Civ. Pro. 26(e). See Appendix E. The record clearly shows that Judge Hoyt granted deemed admissions to Thanedar because of the documented proof Thanedar presented in his motion for deemed admissions that Time Warner attorneys knowingly misrepresented to the district court that they responded timely to Thanedar's two Requests for admissions when the documented U.S.P.S. markings and tracking showed that they did not. A common person in the street would not be shocked by petitioner's opinion and the use of the word "lie" in connection with the above circumstances. It is further evident that Time Warner attorneys have no greater constitutional rights than that of Thanedar's or any average citizen representing himself or herself.

b. The district court (Judge Hittner) cited the fact that Judge Hoyt had imposed discovery sanction on Petitioner, which was partly withdrawn after petitioner showed that he did file a response to defendant's motion to dismiss on a timely basis. Defendants say that petitioner made "325 objections" in his deposition, but fail to disclose their role in the "325 objections" by insisting on knowing "all details" of criminal investigations being conducted on a subsequent employer by FBI-McAllen, Texas, Department of Justice, Texas Education Agency, and U. S. Attorney's Office in Houston, Texas during Thanedar's deposition by Time Warner's attorney. It is to be noted that Thanedar paid the sanction and made corrections as required by Judge Hoyt. Defendants were accorded full relief in this regard with no residual complaints. Thanedar has diligently complied with all rules and law. As noted above, Judge Hoyt imposed sanctions on Time Warner for their conduct in this case. See Appendices E, F, G, and H. Thus Judge Hittner unfairly singled out Thanedar for preclusive order.

c. The district court further cites the fact that petitioner's Title VII lawsuit was dismissed under Fed. R. Civ. Pro.

Rules 41(b) and 37(d) as petitioner was unable to prosecute his Title VII case pro se while working as a full time Chief Financial Officer for a subsequent employer 400 miles away from Houston, Texas. However SOX lawsuit was filed separately precisely because Time Warner opposed consolidation of it with petitioner's Title VII lawsuit after being put on notice. Petitioner has a statutory and constitutional right that his SOX case be tried separately under law. The failure of petitioner's Title VII case is irrelevant to the reasonable basis in law of his SOX lawsuit.

Judge Hittner cited the above complaints as the basis for depriving and restricting Thanedar's constitutional rights. As Thanedar's Title VII and SOX lawsuits are genuine grievances and have reasonable basis in law under this Court's precedent, the district court lacks power to deprive or restrict petitioner's First Amendment and due process rights.

4. How does petitioner's case become one of the grossest abuse in 22 years in 4 days?

Petitioner's SOX lawsuit was presided over by Judge Hoyt for nearly two years before it was transferred to Judge Hittner 2 days before the jury trial. Judge Hittner had this case for a total of 5 days. Appendix J. Under one federal judge (Judge Hoyt) Thanedar's SOX lawsuit was being successfully prosecuted. Judge Hoyt denied Time Warner's motion for summary judgment. Petitioner was successful in obtaining deemed admissions against Time Warner due to its failure to comply with discovery rules and its improper conduct in obstructing discovery and lack of veracity about it. See Appendices E, F, G, and H. Thus Petitioner's lawsuit in which he was able to defeat Time Warner's motion for summary judgment and obtain deemed admissions against it, had clear merit and basis in law. It does not become "frivolous" and "vexatious" in a matter of a day or two just because petitioner's case got transferred to another judge

before jury trial to another court presided by Judge Hittner. Appendix J.

Within a few days of the transfer of this case (see Appendix J) to Judge Hittner, Judge Hittner called Thanedar's SOX case "one of the grossest abuse the undersigned [Judge Hittner] has observed in 22 years." Appendix C, page 6. How does Thanedar's federal lawsuit change from a reasonably successful one to one of the grossest abuse in 22 years? Petitioner contends that such berating, tone, tenor, and hyperbole from the bench is not warranted against a pro se party, especially when the lawsuits in question are clearly based in law and advance the public's interest. District court took affront to Thanedar's pro se status brushing aside the troubled history and legal violations by defendants and some of the largest fines imposed on them by SEC and the Department of Justice

This Court has supervisory power over lower courts' conduct of a case. This Court should review the preclusive order and injunction in this case and reverse it.

5. District court's error in restricting Thanedar's constitutional right is not harmless and should be reversed

District court's preclusive order is not harmless as it stigmatizes Thanedar and harms his future interests by district court's comments and opinion. Justice O'Connor held in *BE&K Construction* that even if NLRB's remedies were not punitive, the finding of illegality alone is a "burden on petitioning." The same is true in this case. District court's pre-filing injunction is arbitrary and unreasonable and is a burden on petitioning for Thanedar.

In addition, appeals court's decision and injunction conflict with several circuit courts that have held that pre-filing orders infringe the fundamental right to access the courts. The Ninth Circuit has held that a pre-filing order

restricts an individual's access to the court system. *Moy v. United States*, 906 F.2d 467, 470 (9th Cir. 1990). "[a]n injunction cannot issue merely upon a showing of litigiousness." *Id.* Rather, [t]he plaintiff's claims must not only be numerous, but also be patently without merit." *Id.* Other circuits have similarly emphasized extreme caution in imposing such orders. See, e.g. *In re Powell*, 851 F 2d 427, 434 (D.C. Cir. 1988) ("[M]ere litigiousness alone does not support the issuance of an injunction. Both the number and content of the filings bear on a determination of frivolousness or harassment." (citation and footnote omitted)); *In re Oliver*, 682 F. 2d 443, 446 (3rd. Cir. 1982) ("Oliver's litigiousness alone would not support an injunction restricting his filing activities...[L]egitimate claims should receive a full and fair hearing no matter how litigious the plaintiff may be.").

6. District court's preclusive order against Thanedar sets a perilous precedent due to its chilling effects against whistleblowers and is against sound public policy

A preclusive order against a whistleblower such as Thanedar who filed claims against a company such as Time Warner with troubled history of non-compliance with laws attracting some of the largest fines in the history of corporate fraud for violations of laws is of exceptional public importance in its chilling effects given the trillions of dollars lost due to recent financial fraud and scandals. This court should review and reverse the district court's preclusive order in this case.

The fact that petitioner is representing himself or that his Title VII lawsuit was unsuccessful is no reason to undermine the unmistakable plain language of the Sarbanes-Oxley Act's provisions protecting a whistleblower's rights under Section 1514A(d) and Sec. 1514A(b)(1)(B). Lower courts' wrongful disregard for the plain language of the Sarbanes-Oxley Act and Texas Labor Code Sec. 61(015)(a) is not harmless. Congress fully intended by plain language

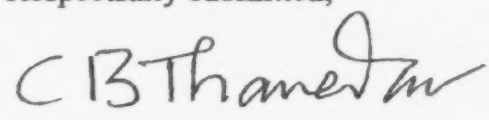
of SOX that merits of a whistleblower's claim must be decided by courts, and Texas Law mandates that the only reason bonus wages may not be paid is by agreement between the employee and the employer. Such an agreement must be proven by an employer in a jury trial. This Court should review the hasty generalizations of res judicata applied to petitioner's SOX and unpaid wage claims and reverse the lower court's opinions. Appeals court went far off the road in creating new law to deny hearing to the petitioner's valid SOX claims in its unpublished opinion in conflict with other circuits and with this Court.

This Court has supervisory power over lower court's wrongful disregard for the plain language of Sarbanes-Oxley law and that of Texas Labor Code. The SOX issues presented are matters of first impression before this Court and of great importance to the public. Therefore, this Court should review and reverse the decisions of the lower court.

CONCLUSION

The petition for the writ of certiorari should be granted.

Respectfully submitted,



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March 3, 2010

United States Court of Appeals
Fifth Circuit
FILED
November 3, 2009
Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 08-20734

CHANDRASHEKHAR B. THANEDAR,

Plaintiff-Appellant

v.

TIME WARNER, INC., TIME WARNER CABLE, INC., TEXAS AND KANSAS CITY CABLE PARTNERS, L.P., TIME WARNER ENTERTAINMENT- ADVANCE/ NEWHOUSE PARTNERSHIP, TIME WARNER COMMUNICATIONS OF HOUSTON, L.L.P., AND TIME WARNER ENTERTAINMENT COMPANY, L.P.,

Defendants-Appellees

Appeal from the United States District Court
for the Southern District of Texas, Houston Division
USDC No. 4:06-CV-02139

Before CLEMENT, PRADO, and ELROD, Circuit Judges.

PER CURIAM:*

* Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

Plaintiff-Appellant Chandrashekhar B. Thanedar appeals the district court's entry of judgment pursuant to Federal Rules of Civil Procedure 50 and 52 on his claims for whistleblower retaliation in violation of Section 806 of the Sarbanes-Oxley Act, 18 U.S.C. § 1514A, breach of contract, and violations of the Texas Payday Law, Tex. Lab. Code Ann. § 61.001 *et seq.* (Vernon 2006). For the reasons stated below, we affirm.

I. FACTUAL BACKGROUND

From 2000 to 2004, Time Warner Cable-Houston Division (TWC-Houston) employed Thanedar as its Director of Finance. At the time of Thanedar's employment, TWC-Houston was part of a partnership between Comcast Corporation (Comcast), which owned a fifty-percent interest in the partnership and is not a party to this suit, and other Time Warner Cable (TWC) entities. This partnership was known as Texas and Kansas City Cable Partners LLP (TKCCP). TWC is a subsidiary of Time Warner Inc. (TWI).

In the spring of 2003, Thanedar applied for the position of controller at TWC-Houston. He did not receive the promotion. Instead, TWC-Houston hired Richard Gray, an outside applicant. On June 17, 2003, Thanedar filed a complaint with Marla Barnard, then-Vice President of Human Resources for TWC-Houston, asserting that his pay grade and salary should be equal to or higher than the controller position. Barnard testified that she thoroughly investigated this complaint and concluded that Thanedar's pay grade and salary were correct. Thanedar filed a second complaint on August 29, 2003 requesting a formal written response as to why his internal bid for the position was denied. After receiving Barnard's response, Thanedar filed a charge with the Equal Employment Opportunity Commission (EEOC), asserting that he was not promoted to controller because of his Indian heritage.

According to the testimony of George Fritz Fryer, then-Vice President of Finance for TWC-Houston, Thanedar's job performance deteriorated over the next several months. Fryer reprimanded Thanedar on October 17, 2003 for relying too heavily on e-mail rather than in-person communication and for excessive absences. On November 11, 2003, Thanedar filed an amended charge with the EEOC alleging that Fryer unlawfully retaliated against him for filing his first complaint by writing him up for excessive absences. In December of 2003, Fryer testified that he presented Thanedar with his performance evaluation, which highlighted concerns about Thanedar's willingness to accept responsibility and effectively resolve problems.

In January, Thanedar met with Fryer and Barnard to discuss his performance evaluation. Fryer testified that Thanedar raised the issue of accounting irregularities within TWC-Houston's finance division and called for a Sarbanes-Oxley review at this meeting. Anthony DePaoli, Director of Internal Audit at TWI, testified that Thanedar called him in January of 2004 to report accounting concerns, rather than using a confidential hotline.

DePaoli and Steve Fiedler, Vice President of Internal Audit for TWI, conducted a conference call with Thanedar to discuss his concerns. Based on Thanedar's allegations, a team of auditors, including DePaoli, traveled to TWC-Houston to perform audit tests to determine the validity of Thanedar's concerns. The audit took several weeks to perform. DePaoli testified that after concluding the audit, he could not corroborate Thanedar's allegations.

Fryer testified that Thanedar's performance continued to deteriorate over the next several months. According to Fryer, Thanedar failed to maintain good working relationships with the accounting department and the

controller. Furthermore, Barnard testified that Thanedar shamed a subordinate via a public e-mail rather than handling the matter privately. On October 22, 2004, Thanedar was terminated for failure to meet performance expectations.

II. PROCEDURAL HISTORY

Thanedar filed a complaint with the Occupational Safety and Health Administration (OSHA) on January 18, 2005. Thanedar had previously filed a separate lawsuit asserting claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-17, and under 42 U.S.C. § 1981. In that lawsuit, Thanedar claimed that the appellees terminated his employment because of his race and in retaliation for engaging in protected activity. The Title VII lawsuit was dismissed with prejudice on February 8, 2006.

On June 26, 2006, Thanedar filed the instant lawsuit in the district court asserting retaliation for whistleblowing in violation of 18 D.S.C. § 1514A. On January 4, 2008, the court assessed costs and sanctioned Thanedar for "troubling and indefensible" conduct during his deposition. During that deposition, Thanedar had asserted 325 objections and refused to answer any question he deemed helpful to the appellees. As a result, the court prohibited Thanedar from conducting any further discovery without the prior consent of the appellees. On May 14, 2008, the district court granted Thanedar's motion for deemed admissions. Prior to trial, the appellees moved for summary judgment; the district court denied this motion.

For unknown reasons, Thanedar moved for an evidentiary hearing on the issue of his deemed admissions. The district court conducted the hearing as part of the pretrial conference. During the hearing, the court withdrew the deemed admissions. The court then ordered the state law claims tried before a jury and the Sarbanes-Oxley claims

tried before an advisory jury. The court also denied Thanedar's motion for a continuance.

At trial, the court set a timing order limiting the appellees to eight hours at trial and Thanedar to seventeen hours. When Thanedar went over his allotted time, the court provided additional time. During the course of trial, Thanedar accused opposing counsel of lying to the court on multiple occasions. He also made comments about the competency of opposing counsel in front of the jury. At the close of the evidence, the appellees moved for judgment as a matter of law, which the court granted. The court entered findings of fact and conclusions of law, dismissing the state law claims under Rule 50(a) and the Sarbanes-Oxley claims under Rule 52(a).

III. DISCUSSION

A. The District Court's Discretionary Rulings

Thanedar raises several objections to the district court's discretionary rulings. He argues that these rulings deprived him of a fair trial and his constitutional right to due process. We address each of the rulings separately.

Thanedar argues that the district court's entry of a timing order deprived him of his due process rights. Ordinarily, we review the district court's timing order for abuse of discretion. *See United States v. Gray*, 105 F.3d 956, 963 (5th Cir. 1997). In this instance, however, Thanedar failed to raise an objection to the timing order. Thus, we review for plain error. *Id.*

We find that the district court's timing order was not plainly erroneous. "[A]district judge has broad discretion in managing his docket, including trial procedure and the conduct of trial." *Sims v. ANR Freight Sys., Inc.*, 77 F.3d 846, 849 (5th Cir. 1996). In setting the amount of time for trial, the district court considered each party's estimate of the time

needed. The court continually reminded both parties of the time used and the time remaining for presentation of each side's case. The court also offered suggestions to Thanedar on how to focus his questioning of witnesses so as to preserve his time. We find no evidence in the record that the order was issued or enforced in a manner that deprived Thanedar of due process.

Thanedar next argues that the district court violated his due process rights when it denied his motion to withdraw his jury demand. Appellees respond that this issue is moot, as the court granted their motion for judgment and the case was never submitted to the jury. We agree. "Under Article III of the Constitution, federal courts may adjudicate only actual, ongoing cases or controversies." *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477 (1990). Once the district court granted the appellees' motion for judgment, the jury could have absolutely no influence on the outcome of the case. At that point, Thanedar no longer had any remaining interest in the outcome of his motion to withdraw his jury demand. *Cf. Baranowski v. Hart*, 486 F.3d 112, 126 (5th Cir. 2007) (holding plaintiff's demand for jury trial moot once court granted summary judgment).

Thanedar claims that the district court's decision to withdraw the deemed admissions should be reversed. We review withdrawal of admissions for abuse of discretion. *Carney v. IRS (In re Carney)*, 258 F.3d 415, 419 (5th Cir. 2001). A district court may permit the withdrawal of an admission if the withdrawal would "promote the presentation of the merits of the action and if the court is not persuaded that it would prejudice the requesting party in maintaining or defending the action on the merits." Fed. R. Civ. P. 36(b).

We conclude that the withdrawal advanced the presentation of the case on the merits. The appellees cite two examples of issues at trial that would not have been

developed but for the withdrawal of the admissions: the reasons for Thanedar's termination and the consolidation of TKCCP's financial results with those of TWI. Thanedar argues, without citing any authority, that the two issues are irrelevant to the case. On the contrary, these issues were critical for determining whether Thanedar was employed by a publicly-traded company and suffered retaliation for whistleblowing. *See* 18 D.S.C. § 15141A. The withdrawal of the admissions thus satisfies the first prong of the test under Rule 36(b).

We likewise find that the withdrawal of the admissions did not prejudice Thanedar. Prejudice may occur where a party faces "special difficulties ...caused by a sudden need to obtain evidence upon withdrawal or amendment of an admission." *Am. Auto. Ass'n., Inc., v. AAA Legal Clinic of Jefferson Crooke, P.C.,* 930 F.2d 1117, 1120 (5th Cir. 1991). However, "[t]he necessity of having to convince a trier of fact of the truth of a matter erroneously admitted is not sufficient." *N. La. Rehab. Center, Inc. v. United States*, 179 F. Supp. 2d 658, 663 (W.D. La. 2001) (quoting *F.D.I.C. v. Prusia*, 18 F.3d 637, 640 (8th Cir. 1994)). Thanedar did not suffer prejudice due to the timing of the court's ruling. Testimony from the appellees' depositions and their production of documents should have put Thanedar on notice that the appellees were taking a position contrary to the deemed admissions. Any prejudice from the withdrawal of the admissions resulted "from the inaccuracy of the admissions rather than the stage of the proceedings at which the [appellees] sought to amend [their] admissions." *Prusia,* 18 F.3d at 640. Moreover, Thanedar voluntarily put the issue of the admissions back into consideration by requesting an evidentiary hearing. Therefore, he cannot claim to have been unfairly surprised by the district court's ruling. *Cf. Am. Auto. Ass'n.*, 930 F.2d at 1120 (finding clear prejudice where district court sua sponte withdrew admissions after trial). The

district court did not abuse its discretion in granting the appellees' motion to withdraw the deemed admissions.

During the discussion at the pretrial conference on the issue of whether there would be a jury trial, Thanedar moved for a continuance. The district court denied this motion. We review the grant or denial of a continuance for abuse of discretion resulting in serious prejudice. *United States v. German*, 486 F.3d 849, 854 (5th Cir. 2007). Thanedar's sale argument for a continuance is that he suffered prejudice from the withdrawal of the admissions. Having concluded that the withdrawal of the admissions did not result in prejudice to him, we likewise find that Thanedar has not made a sufficient showing of prejudice resulting from the denial of his motion for a continuance. We will not reverse the district court's decision in the absence of a sufficient showing of prejudice. *See Johnson V. Harris County Flood Control Dist.*, 869 F.2d 1565, 1571 (5th Cir. 1989).

B. The Appellees' Motions for Judgment

We now turn to the district court's grant of the appellees' motion for judgment on all claims.[1] We review a judgment made under Rule 50(a) de novo. *Hagan v.*

[1] At the outset, we observe that the appellees erroneously brought a single motion for judgment as matter of law under Federal Rule of Civil Procedure 50(a). Since the Sarbanes-Oxley claim was tried before an advisory jury, the appellees should have brought a motion for judgement on partial findings under Federal Rule of Civil Procedure 52(c). The district court orally granted the appellees' motion but subsequently corrected the error and treated the motion as one for judgment under Rule 50(a) on the state law claims and one for judgment under Rule 52(a) on the Sarbanes-Oxley claim. We find that the error did not prejudice Thanedar; on the contrary, it favored him. Rule 50(a) requires that the evidence be considered in the light most favorable to the plaintiff. Fed. R. Civ. P. 50(a). Rule 52(a) only requires weighing the evidence to determine whether the plaintiff has proven his case. Fed. R. Civ. P. 52(a). Moreover, the district court complied with Rule 52(a)'s requirement that the court state its findings of fact and conclusions of law separately.

Echostar Satellite, L.L.C., 529 F.3d 617, 622 (5th Cir. 2008). In reviewing a grant of judgment under Rule 52(c), we review the district court's conclusions of law de novo and its findings of fact for clear error. *Samson v. Apollo Res. Inc.*, 242 F.3d 629,632-33 (5th Cir. 2001). When the district court's findings of fact are based on the credibility of a witness, however, we afford even greater deference to those findings. *Id.*

The district court held that all three of Thanedar's claims were barred by the doctrine of res judicata, as the claims should have been litigated in his Title VII lawsuit. Res judicata, or claim preclusion, bars the litigation of claims that either have been litigated or should have been litigated in an earlier lawsuit. *Southmark Corp. v. Coopers & Lybrand (In re Southmark Corp.),* 163 F.3d 925, 934 (5th Cir. 1999). The test for claim preclusion has four elements: "(1) the parties are identical or in privity; (2) the judgment in the prior action was rendered by a court of competent jurisdiction; (3)the prior action was concluded to a final judgement on the merits; (4) the same claim or cause of action was involved in both claims." *Id.*

Thanedar does not contest the first or the third elements of the test. On appeal, he first argues that his Title VII claim was not identical to his Sarbanes-Oxley claim. To determine whether the claims are in fact identical, we apply the transactional test, which considers whether the two claims rest on "the same nucleus of operative facts." *Id. (quoting Bank of Lafayette v. Baudoin (In re Baudoin)*, 981 F.2d 736,743 (5th Cir. 1993)). Under this approach, the operative facts define the claims, not the relief requested, legal theories, or rights asserted. *Agrilectric Power Partners, Ltd. v. Gen. Elec. Co.*, 20 F.3d 663, 665 (5th Cir. 1994). If the operative facts are the same, the prior judgment's preclusive effect "extends to all rights the original plaintiff

had 'with respect to all or any part of the transaction, or series of connected transactions, out of which the [original] action arose.'" *Petro-Hunt V. United States*, 365 F.3d 385, 395-96 (5th Cir. 2004)(alteration in original) (quoting Restatement (Second) of Judgments § 24(1)(1992)).

We agree with the district court that all three of Thanedar's claims arise from the same core set of facts. Thanedar asserts three different claims of relief, all of which arise from the fact that he suffered an adverse employment action and that his employer ultimately terminated his employment out of illegal and retaliatory motives. *See Leon V. IDX Sys. Corp.*, 464 F.3d 951, 962 (9th Cir. 2006) (holding that plaintiffs Sarbanes-Oxley claim and Title VII retaliation claims involved the same nucleus of operative facts, including the time, cause, and circumstances of plaintiffs termination); see also *Nelson v. AMX Corp.*, No. 3:04-cv-1350- H, 2005 WL 2495343, at *6 (N.D. Tex. Sept. 22, 2005) (holding that the same nucleus of operative fact existed between an employee's claim under her employment contract and subsequent discrimination claim). The fact that the retaliatory motive asserted in the Title VII suit was not identical to that of the Sarbanes-Oxley claim does not bar a finding of res judicata. We have previously held that claims asserting different grounds for wrongful termination may nevertheless be subject to claim preclusion. *See, e.g., Miller v. U.S. Postal Serv.*, 825 F.2d 62,64 (5th Cir. 1987) (sex and disability discrimination); *Fleming v. Travenol Labs., Inc.*, 707 F.2d 829, 830 (5th Cir. 1983) (race and sex discrimination). As the district court aptly noted, both of Thanedar's lawsuits focus "on one critical issue: whether Thanedar's employer had a legitimate and lawful reason for taking the adverse employment action of which he complains." This is sufficient to establish a "same nucleus of operative fact." *In re Southmark*, 163 F.3d at 934.

Thanedar argues that the district court presiding over his Title VII lawsuit lacked subject matter jurisdiction to hear his Sarbanes-Oxley claim. "It is black-letter law that a claim is not barred by res judicata if ... the court rendering judgment lacked subject-matter jurisdiction over a claim." *Browning v. Navarro*, 887 F.2d 553,558 (5th Cir. 1989). Under Sarbanes-Oxley, once 180 days have elapsed after the filing of a complaint with OSHA, a plaintiff may bring suit in federal district court if the Secretary of Labor has not acted on the matter. *See* 18 U.S.C. § 1514A(b)(l)(B). Thanedar filed his administrative complaint with OSHA on January 18, 2005. The 180-day waiting period expired on July 8, 2005. At that point, Thanedar could have filed suit under Sarbanes-Oxley and moved to consolidate the claim with his Title VII lawsuit, which was still pending. However, Thanedar waited until June 26, 2006 to file his Sarbanes-Oxley claim. This type of piecemeal litigation undercuts the finality of judgments, which is precisely what claim preclusion seeks to ensure. *See Nevada v. United States*, 463 U.S. 110, 129-30 (1983). We conclude that the district court presiding over Thanedar's Title VII lawsuit was competent to adjudicate his claim under 18U.S.C. § 1514A and there was no impediment to consolidation of the claims. Thanedar therefore should have filed a motion to consolidate his Sarbanes-Oxley claim with his claims under Title VII.

Thanedar next argues that the appellees cannot assert res judicata because they have acquiesced to splitting the claims. In *Super Van, Inc., v. City of San Antonio (In re Super Van)*, 92 F.3d 366 (5th Cir. 1996) we held that "a second action may be brought by a plaintiff on the same cause of action if "the parties have agreed in terms or in effect that the plaintiff may split [its] claim, or the defendant has acquiesced therein." *Id.* at 371 (alteration in original) (quoting Restatement (Second) of Judgments § 26(1)(a)).

Thanedar asserts that the appellees opposed his efforts to consolidate the claims when he sought a continuance in his Title VII suit in order to find new counsel. While Thanedar referenced his desire to find counsel to pursue claims under the Sarbanes-Oxley Act, in the end, his motion was one for a continuance. The appellees opposed this motion on the grounds that the plaintiff had been dilatory in prosecuting his case. Such opposition, however, cannot be construed as acquiescence to claim splitting.

Thanedar also cites the joint motion for a continuance filed by the parties on March 29, 2007 as evidence of acquiescence. In that motion, the parties requested a continuance until this court had ruled on the dismissal of Thanedar's Title VII suit. The parties also noted that if the dismissal of the Title VII claim was reversed and remanded, then it should be consolidated with the Sarbanes-Oxley lawsuit. 2 This scenario is readily distinguishable from the one presented in Super Van. In that case, the bankruptcy court sua sponte raised the issue of whether the two suits currently pending should be consolidated. 92 F .3d at 369. Counsel for the defendant explicitly stated that his client preferred to litigate the two lawsuits separately. Id. In this instance, the appellants only agreed to consolidate as a contingency if this court reinstated Thanedar's Title VII claim. According to the Restatement:

> Where the plaintiff is simultaneously maintaining separate actions based upon parts of the same claim, and in neither action does the defendant make the objection that another action is pending based on the same claim, judgment in one of the actions does not preclude the plaintiff from proceeding and obtaining

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[2] We affirmed the dismissal with prejudice of Thanedar's Title VII suit. *Thanedar v. Time Warner Commc'ns of Houston, L.L.P.*, 227 F. App'x 385 (5th Cir. 2007) (unpublished).

> judgment in the other action. The failure of the defendant to object to the splitting of the plaintiffs claim is effective as an acquiescence in the splitting of the claim.

Restatement (Second) of Judgments § 26 cmt. a. Thanedar's Title VII suit had already been dismissed with prejudice; the fact that it was pending on appeal does not mean that it was still "pending" for the purposes of waiving res judicata. *See Stoll v. Gottlieb*, 305 U.S. 165, 170 (1938) (holding that a judgment determining a right under a federal statute is final until reversed, modified, or set aside).

Finally, Thanedar argues that by participating in the OSHA proceedings, the appellees waived their right to assert res judicata. This argument likewise fails, as the Title VII suit was dismissed well after the 180-day waiting period for the OSHA complaint had expired. Nor could the appellees have moved for consolidation of an administrative complaint with a proceeding in federal court. To conclude, we affirm that all three claims were barred by res judicata. As a result, we do not reach the district court's alternative holdings.

C. The Preclusion Order

In its order entering judgment for the appellees, the district court included a preclusion order against Thanedar. This order prevented him from filing any motions, actions, or complaints in the United States District Court for Southern District of Texas that directly or tangentially raised an issue adjudicated in the instant case without first obtaining leave of the court. Thanedar appeals this decision, arguing that it violates his due process rights and was not based on any evidence in the record. A preclusion order is akin to an anti-suit injunction and we therefore review for abuse of discretion. *Kaepa, Inc. v. Achilles Corp.*, 76 F.3d 624, 626 (5th Cir. 1996).

It is well-settled that a plaintiffs *pro se* status does not give him a "license to harass others, clog the judicial machinery with meritless litigation, and abuse already overloaded court dockets." *Farguson v. MBank Houston, N.A.*, 808 F.2d 358, 359 (5th Cir. 1986). There is no constitutional right to prosecute frivolous actions, and preclusion orders are appropriate tools for deterring vexatious filings. *Kaminetzky v. Frost Nan Bank of Houston*, 881 F. Supp. 276, 277-78 (S.D. Tex. 1995). When issuing such an order, however, a court must ensure that it is "tailored to protect the courts and innocent parties, while preserving the legitimate rights of litigants." *Farguson*, 808 F.2d at 360.

We find that there was ample basis for the district court to enter a preclusion order in this case. As the district court noted, Thanedar exhibited a disturbing pattern of behavior in his Title VII lawsuit. In that suit, after the court had denied his motion for a continuance and granted the appellees' motion to compel discovery, Thanedar filed a notice of appeal, despite the fact that such rulings are not "final orders" subject to appellate review. Thanedar also refused to attend his deposition, failed to respond to the appellees' discovery requests, and did not comply with the court's orders. Consequently, the district court dismissed his Title VII suit with prejudice. *See Thanedar v. Time Warner Commc'ns of Houston, L.L.P.*, No. 4:04-cv-04188 (S.D. Tex. Feb. 8, 2006). A panel of this court affirmed the dismissal, observing that Thanedar had engaged in "serially contumacious conduct" and asserted a "frivolous" due process claim on appeal. *Thanedar v. Time Warner Commc'ns of Houston, L.L.P.*, 227 F. App'x 385, 387 (5th Cir. 2007) (unpublished). Thanedar filed a petition for certiorari, which the Supreme Court denied. *Thanedar v. Time Warner Commc'ns of Houston, L.L.P.*, 128 S. Ct. 1077 (2008).

Thanedar continued to employ obstructive tactics while litigating his Sarbanes-Oxley claim. As noted earlier, the district court imposed sanctions on Thanedar for refusing to answer questions during his deposition. In addition, Thanedar accused defense counsel of lying to the court at various points and made insulting comments regarding the competency of Time Warner's counsel in front of the jury. The district court concluded that this pattern of behavior represented "one of the grossest abuse[s] of the federal civil process the undersigned has observed in the course of twenty-two years on the federal bench." *Thanedar v. Time Warner Inc., et al.*, No. 4:06-cv-02139, at *7 (S.D. Tex. Oct. 7, 2008).

We also find that the preclusion order was narrowly tailored so as to preserve Thanedar's access to the courts. *See Farguson,* 808 F.2d at 360. The order only enjoined Thanedar from filing further motions or claims relating to the issues presented in the instant lawsuit in the district court without leave of the court. Thanedar requested and ultimately obtained leave to file this appeal, a motion to stay enforcement pending appeal, and a motion to oppose appellees' request for an appellate bond. We therefore conclude that the order was not overly broad and that the district court did not abuse its discretion.

D. Thanedar's Motion for New Trial and to Amend Judgment

Pursuant to the court's preclusion order, Thanedar moved for leave to file a motion for new trial and to amend the judgment. The district court denied leave to file this motion. As we have already determined that the preclusion order was within the sound discretion of the district court, we find that the denial of leave to file this motion was not an abuse of discretion. The district court's denial of leave did not

block Thanedar's access to the courts. Furthermore, we observe that Thanedar's underlying motion for a new trial and to amend the judgment largely restates his appeal on the merits. *Youmans v. Simon,* 791 F.2d 341, 349 (5th Cir. 1986). As we have already affirmed the district court's decision on the merits, there would be no need for us to consider this motion. *See id.* The district court's denial of leave to file the motion was therefore not an abuse of discretion.

E. Thanedar's Motion for Recusal

Thanedar also appeals the denial of leave to file a motion for recusal. Under 28 U.B.C § 455(a), "[a]ny justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." A litigant seeking to disqualify a judge "must do so at the earliest moment after knowledge of the facts demonstrating the basis for such disqualification." *Travelers Ins. Co. v. Liljeberg Enters., Inc.,* 38 F.3d 1404, 1410 (5th Cir. 1994). We review a denial of a motion to recuse for abuse of discretion. *Andrade v. Chojnacki,* 338 F.3d 448, 454 (5th Cir. 2003).

We conclude that the motion to recuse was untimely filed. Of the eighteen record references Thanedar cites in support of his motion, seventeen occurred during pretrial or trial. The only post-trial reference is the preclusion order. Yet Thanedar did not file his motion for recusal until five months after trial. Allowing disqualification to be raised at such a late stage "converts the serious and laudatory business of insuring judicial fairness into a mere litigation stratagem" as it encourages an attorney "to delay making a § 455(a) motion as long as possible if he believes that there is any chance that he will lose at trial." *Delesdernier v. Porterie,* 666 F.2d 116, 121 (5th Cir. 1982). Thanedar should have raised this issue far earlier.

Furthermore, we find no basis in the record to support Thanedar's allegations. Thanedar cites a number of examples of the district court's supposed bias. Several of these examples consist of neutral statements made by the court that do not demonstrate any hint of bias. Other examples are actually attempts by the court to assist both parties to proceed more efficiently so as to avoid wasting their remaining time. The remaining examples, at best, demonstrate nothing more than the court's temporary frustration. Critical or disapproving comments to counselor the parties ordinarily do not support a claim of bias. *Hollywood Fantasy Corp. v. Gabor,* 151 F.3d 203,216 n.6 (5th Cir. 1998). To conclude, 'I'hanedar's motion for recusal was untimely and lacks any factual basis. Therefore, the district court did not abuse its discretion by denying Thanedar leave to file it.

F. The Appellees' Motion for Bill of Costs

Thanedar appeals the district court's grant of the appellees' motion for their bill of costs. Under the Federal Rules of Civil Procedure, costs other than attorney's fees should normally be awarded to the prevailing party. Fed. R. Civ. P. 54(d)(1). Such costs include the fees for witnesses and for trial transcripts necessarily obtained for use in the case. 28 U.S.C. § 1920(2)-(3). We review an award of a bill of costs for abuse of discretion. *Fogleman v. Arabian Am. Oil Co.,* 920 F.2d 278, 285 (5th Cir. 1991).

Thanedar first argues that the appellees filed their bill of costs too late. We find this argument to be without merit. The district court ordered the appellees to submit proposed findings of fact and conclusions of law, along with a separate bill of costs, by July 2, 2008. The court sua sponte extended the deadline for filing the proposed findings of fact and conclusions of law to July 14, 2008. This order does not explicitly state that the extension also applies to the deadline for filing the bill costs. We note, however, that the court

requested that appellees "do the findings of fact and conclusions of law showing that [the bill of costs] is recoverable." Arguably, the court's order could be interpreted to cover the bill of costs as well. Moreover, the court explicitly overruled Thanedar's objection that the filing was untimely, finding that the appellees' July 14 filing was in full compliance with its previous instructions. Given our deferential standard of review, we do not find that this was an abuse of discretion.

Thanedar next argues that the district court erred when it overruled his objection that Stephen Roppolo was not an attorney of record and not authorized to file a bill of costs for the appellees. This argument is without merit. Mr. Roppolo represented all the appellees beginning October 1, 2007, except at trial, where he represented all appellees except TWI. On July 11, 2008, TWI filed a motion to resume its representation by Mr. Roppolo, but due to a clerical error in docketing, the substitution order was not executed until October 14. When it issued the substitution order, the court made the effective date July 11 in order to correct the error. This action was well within the trial court's discretion, as Rule 60(a) allows a court to correct a "clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record." Fed. R. Civ. P. 60(a). The court may do so "on its own [motion] with or without notice." *Id.* Moreover, the bill of costs was jointly filed by the appellees, all of whom, with the exception of TWI, were continuously represented by Mr. Roppolo since October 1, 2007. The district court did not abuse its discretion in overruling Thanedar's objection.

We now turn to Thanedar's argument that the court should not have awarded certain costs to the appellees. "We accord the district court great latitude" in determining that particular costs are necessary to the case. *Fogelman,* 920 F.2d at 286. Thanedar first objects to the award of the costs

of expedited trial transcripts. We have previously held that the extra cost of obtaining a trial transcript on an expedited basis is not taxable absent prior court approval unless the special character of the litigation necessitates the expedited receipt of the transcripts. *Id.* Here, the court found that the trial transcripts were necessary for the appellees to ensure that they could provide findings of fact and conclusions of law properly supported by the record evidence. In light of the fact that the district court gave the appellees forty-two days to obtain a 1270-pagetranscript, review it, and submit detailed findings of fact, the court's decision to award the costs of obtaining the transcript on an expedited basis was not an abuse of discretion.

We likewise affirm the district court's decision to award appellees the cost of DePaoli's lodging expenses for one additional night. Thanedar argues that these extra costs should not be recovered because he was not consulted prior to their incurrence. He does not contest the district court's finding that DePaoli was one of the most critical witnesses in the case and that DePaoli's additional lodging expenses were due to the inordinate amount of time Thanedar spent examining other witnesses, which prevented DePaoli from testifying as scheduled on May 28. A court may award fees where a witness is present "in necessary attendance on the court in readiness to testify." *Nissho-Iwai Co. v. Occidental Crude Sales, Inc.*, 729 F.2d 1530, 1552 (5th Cir. 1984) (quoting *Hurtado v. United States*, 410 U.S. 578, 584 1973)). We find that the award of the additional lodging fees was not an abuse of discretion.

G. Motions for Sanctions

Also pending before this court are cross motions for sanctions. The appellees request sanctions pursuant to Federal Rule of Appellate Procedure 38, which authorizes this court to award "just damages and single or double costs

to the appellee" in cases where an appeal is found to be frivolous. This court also has the inherent authority to impose sanctions sua sponte. *Coghlan v. Starkey,* 852 F.2d 806, 808 (5th Cir. 1988).

While Thanedar's conduct during the litigation of this case is indeed disturbing, the district court has adequately addressed that conduct. Thanedar has already been sanctioned for "troubling and indefensible" conduct during his deposition. Moreover, the district court entered the preclusion order, which prevents him from filing further claims without leave of the court. Regarding his conduct on appeal, we do not find that sanctions are warranted in this instance, though it is a close question. We evaluate an appeal de novo to determine if it is frivolous under Rule 38. *Topalian v. Ehrman,* 3 F.3d 931, 935 (5th Cir. 1993). Sanctions are appropriate when a party presents arguments that have been "squarely rejected by Fifth Circuit caselaw." *Macklin v. City of New Orleans,* 300 F.3d 552, 554 (5th Cir. 2002). As Thanedar's claims under Sarbanes-Oxley relate to a relatively new area of the law, we decline to impose sanctions so as to avoid unduly chilling advocacy.[3] *Id.* We likewise deny Thanedar's motion for sanctions as utterly without merit.

For the foregoing reasons, the judgment of the district court is hereby AFFIRMED. We DENY the appellees' and Thanedar's motions for sanctions.

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[3] We admonish Thanedar, however, that a *pro se* litigant is not immune to sanctions. *See Stearman v. Comrn'r Internal Revenue,* 436 F.3d 533, 538 (5th Cir. 2006).

IN THE UNITED STATES
COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 08-20734

U. S. Court of Appeals
F I L E D
December 3, 2009
Charles R. Fulbruge III
Clerk

CHANDRASHEKHAR B THANEDAR

Plaintiff - Appellant

v.

TIME WARNER INC; TIME WARNER CABLE INC; TEXAS AND KANSAS CITY CABLE PARTNERS LP; TIMER WARNER ENTERTAINMENT; ADVANCE/NEWHOUSE PARTNERSHIP; TIME WARNER COMMUNICATIONS OF HOUSTON, LLP; TIME WARNER ENTERTAINMENT COMPANY LP

Defendants - Appellees

Appeals from the United States
District Court for the
Southern District of Texas, Houston

ON PETITION FOR REHEARING EN BANC

(Opinion _____, 5 Cir., _____, _____, F.3d _____)

Before Circuit Judges CLEMENT, PRADO, and ELROD.

PER CURIAM:

(✓) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular

active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5th CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5th CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

Sd/_____
Jennifer Walker Elrod
United States Circuit Judge

Judges Barksdale, Southwick, and Wiener did not participate in the consideration of the rehearing en banc.

Order on pet EB treat as pan reh-REHG6A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CHANDRASHEKHAR B. THANEDAR	§	
	§	
Plaintiff,	§	
v.	§	CIVIL ACTION NO.
	§	H-06-2139
TIME WARNER, INC., TIME WARNER CABLE, INC., TEXAS AND KANSAS CITY CABLE PARTNERS, L.P., TIME WARNER ENTERTAINMENT-ADVANCE /NEWHOUSE PARTNERSHIP, TIME WARNER COMMUNICATIONS OF HOUSTON, L.L.P., AND TIME WARNER ENTERTAINMENT COMPANY, L.P.,	§	
	§	
Defendants.	§	

FINDINGS OF FACT, CONCLUSIONS OF LAW, & PRECLUSION ORDER

Beginning on May 27, 2008 and ending on June 2, 2008, the Court conducted a five-day trial on the above-entitled matter. At the close of all the evidence, Defendants presented an oral Motion for Judgment as a Matter of Law pursuant to Rule 50(a). Having considered the motion, the parties' oral argument at a hearing held on June 2, 2008, submissions on file, and applicable law, the Court determines Defendants' Motion for Judgment as a Matter of Law should be granted as to Plaintiffs breach of and Texas Payday Law

Appendix C

claims.[1] Likewise, having considered the argument, testimony, submissions on file, and applicable law, the Court finds Plaintiff cannot prevail on his Sarbanes-Oxley claim.[2] Accordingly, pursuant to Federal Rules of Civil Procedure 50(a) and 52(a), the Court now enters the following findings of fact and conclusions of law. Any finding of fact that should be construed as a conclusion of law is hereby adopted as such. Any conclusion of law that should be construed as a finding of fact is hereby adopted as such.

INTRODUCTION

This is an employment discrimination case. Plaintiff Chandrashekhar B. Thanedar ("Thanedar") alleges Defendants Time Warner, Inc. ("TWI"), Time Warner Cable, Inc. ("TWC"), Texas and Kansas City Cable Partners, L.P. ("TKCCP"), Time Warner Entertainment-Advance/ Newhouse Partnership ("TWE-A/N"), Time Warner Communications of Houston, L.L.P. ("TWCH"), and Time Warner Entertainment Company, L.P. ("TWE") (collectively, "Defendants") unlawfully terminated his employment with Time Warner Cable-Houston Division in Houston, Texas because he allegedly made "whistleblower"·· complaints about alleged financial irregularities in violation of the Sarbanes-Oxley Act. In addition to his Sarbanes-Oxley claim, Thanedar is suing Defendants for breach of contract and failure to pay him an earned bonus in violation of Texas law. Thanedar seeks damages totaling $3,400,000.

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[1] Plaintiff's breach of contract claim and Texas Payday Law claim, TEX.LAB.CODE ANN. § 61.001 *et seq.*, were tried to a jury.

[2] Plaintiff s claim under the Corporate and Criminal Fraud Accountability Act of 2002, 18 U.S.C. § 1514A *et seq* ("Sarbanes-Oxley"), was tried to an advisory jury. *See Schmidt* v. *Levi Strauss & Co.*, No. C-04-01026 RMW, 2008 WL 859795, at *4 (N.D. Cal. Mar. 28, 2008) (explaining Sarbanes-Oxley creates no right to a jury trial); *Murray* v. *TXU Corp.*, Civ. A. No. 3:03-CV-0888-P, 2005 WL 1356444, at *3 (N.D. Tex. June 7, 2005) (finding Sarbanes-Oxley provided no right to a trial by jury but noting the court would consider a request to convene an advisory jury).

BASIS FOR PRECLUSION ORDER

At the outset, the Court notes that although Thanedar is a *pro se* litigant, he is no stranger to the courthouse. Indeed, this is the second time Thanedar has pursued legal action against Defendants. Thanedar's past filings, the pending lawsuit, and his indefensible behavior demonstrate a proclivity toward prosecuting frivolous and vexatious lawsuits that has not gone unnoticed-by the Court. Because of the vexatious nature of Thanedar's past and pending complaints, and the obstinate manner in which the complaints were subsequently prosecuted, the Court determines further action is warranted to prevent him from filing future meritless and abusive actions related to these claims. Because the Court is "authorized to enjoin future filings when necessary to deter vexatious filings which clog the judicial machinery with meritless litigation or are a flagrant abuse of the judicial process," the Court briefly recounts the factual basis for its decision to enjoin further filings by Thanedar. *See Kaminetzky v. Frost Nat'l Bank*, 881 F. Supp. 276, 278 (S.D. Tex. 1995).

A. First Lawsuit

On October 29, 2004, Thanedar filed his first lawsuit ("First Lawsuit") against Defendants asserting various claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and 42 U.S.C. § 1981. Thanedar, an Asian Indian male, asserted Defendants terminated his employment at Time Warner Cable-Houston Division because of his race and in retaliation for engaging in protected activity. Although initially represented by legal counsel, Thanedar's attorney filed a motion to withdraw from the representation because, *inter alia*, Thanedar refused to cooperate or communicate with him and "indicated a lack of trust regarding the judgment and abilities" of his attorney. After the court (United States District Judge Melinda Harmon) granted the motion to withdraw, Thanedar proceeded *pro se*.

Thereafter, Thanedar filed a motion for continuance. However, because Thanedar failed to prosecute his case or retain new legal counsel, the court denied Thanedar's motion for a continuance and instead granted Defendants' motion to compel discovery. Despite the fact that such rulings are not "final orders" subject to appellate review, Thanedar nevertheless filed a Notice of Appeal to the United States Court of Appeals for the Fifth Circuit. Thanedar also moved the court to stay the First Lawsuit pending resolution of his appeal to the Fifth Circuit. After the court denied Thanedar's motion for stay pending appeal, Thanedar, undaunted, filed a writ of mandamus. The Fifth Circuit subsequently denied Thanedar's motion to stay pending appeal and motion for writ of mandamus.

The record also reflects Thanedar refused to appear for his deposition, respond to Defendants' discovery requests, and comply with the court's instructions. Indeed, the court twice admonished and ordered Thanedar to follow its orders. Thanedar refused to heed the court's warnings, and on February 6, 2006, the court granted Defendants' motion to dismiss Thanedar's claims because he failed to comply with reasonable discovery requests and failed to prosecute his claim. In its order of dismissal with prejudice, the court acknowledged "[Thanedar's] persistent pattern of dilatory and contumacious behavior" and noted that its previous warnings "failed to produce any change in [Thanedar's] behavior." *See Thanedar v. Time Warner Commc'ns of Houston, L.L.P.*, No. 4:04-4188 (S.D. Tex. Feb. 8, 2006) (Harmon, J.) (order dismissing with prejudice Thanedar's lawsuit).

The Fifth Circuit affirmed Judge Harmon's dismissal of the First Lawsuit, finding no abuse of discretion in light of "Thanedar's serially contumacious conduct." *Thanedar v. Time Warner Commc 'ns of Houston, L.L.P.*, 227 F. App'x 385, 2007 WL 1425532, at * 1 (5th Cir. May 10, 2007). Likewise, the United States Supreme Court denied Thanedar's petition for writ of certiorari. *Thanedar v. Time*

Warner Commc'ns of Houston, L.L.P., 128 S. Ct. 1077 (2008) (mem.).

B. Second Lawsuit

Four months after dismissal of the First Lawsuit, Thanedar filed the instant lawsuit ("Second Lawsuit") against Defendants (originally assigned to United States District Judge Kenneth Hoyt). As in the First Lawsuit, Thanedar initially retained legal counsel to file the Second Lawsuit. Thanedar's attorney, however, moved the court to withdraw from the representation because "fundamental disagreements" existed between Thanedar and his attorney "concerning the strategy for prosecuting [the] litigation, the management of [the) litigation, and ... the manner in which plaintiff communicates with counsel." Thus, after the court granted the motion to withdraw, Thanedar again proceeded to prosecute his case *pro se*.

On January 4, 2008, Judge Hoyt assessed costs against Thanedar based on his "troubling and indefensible" conduct during his deposition. Thanedar asserted 325 objections to questions asked of him, and after objecting, refused to answer the question because "he intended to assert objections and refuse to answer any question he deemed helpful to the [D]efendants." Describing Thanedar's conduct as "irresponsible and indefensible," the court noted that just because Thanedar "is proceeding *pro se*[,] does not give license for him to indiscriminately play the role of lawyer and client as the circumstances of his mind dictate," Accordingly, Judge Hoyt ordered Thanedar to submit to a second deposition, answer all questions asked after stating his objections, and pay costs to Defendants in the amount of $6,657.63.

By agreement of the judges, the Second Lawsuit was transferred to the undersigned for the purposes of trial on May 21, 2008. During trial, Thanedar-on more than one occasion-accused opposing counsel of lying, made insulting

comments directed at opposing counsel in front of the jury, and generally demonstrated dilatory, belligerent, and unreasonable conduct.

Although the courts are generally accessible to all individuals, litigants who abuse the process may be denied access to the judicial system. *Farguson v. MBank Houston, NA.*, 808 F.2d 358, 360 (5th Cir. 1986). Put simply, there is no constitutional right of access to the court to prosecute frivolous or malicious actions. *Kaminetzky*, 881 F. Supp. at 277. Consequently, a litigant may be enjoined from filing pleadings and complaints when necessary "to deter vexatious and frivolous filings or to protect the integrity of the courts and the orderly and expeditious administration of justice." *Id.*

Thanedar's pattern of abusive litigation and egregious conduct, as depicted above, demonstrate one of the grossest abuse of the federal civil process the undersigned has observed in the course of twenty-two years on the federal bench. Thus, to prevent the unnecessary and costly expenditure incurred by the judicial system and Defendants in adjudication of and defending against these types of actions, the Court finds it is necessary to enjoin further filings by Thanedar without leave of Court. *See infra* pp. 40-41; *Kaminetzky,* 881 F. Supp. at 278.

FINDINGS OF FACT

1. From 2000 to 2004, Time Warner Cable-Houston Division employed Thanedar as its Director of Finance.[3]

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[3] Thanedar testified he has a master's degree in business administration ("MBA") from the University of New Orleans and a bachelor's degree in law, a bachelor's degree in accounting, and a graduate degree in cost and works accounting from universities in India. He passed the Certified Public Accountants ("CPA") exam in 1983, but his status is inactive. Thanedar testified he has been unemployed for the past two years.

2. Thanedar did not have an employment contract with Time Warner Cable-Houston Division.[4] He was an at-will employee.

3. At the time of Thanedar's employment, Time Warner Cable-Houston Division was part of a partnership between Comcast Corporation ("Comcast"), which owned a fifty percent interest and is not a party to this lawsuit, and certain TWC entities, which owned the remaining fifty percent of the partnership.

• This partnership was known as TKCCP.

• George "Fritz" Fryer ("Fryer"), former Vice President of Finance for Time Warner Cable-Houston Division, testified that TWI accounted for its investment in TKCCP using the equity method. The financial results of TKCCP were not consolidated with the financial results of TWI.

• Ron McMillan ("McMillan"), former President of Time Warner Cable-Houston Division, also testified that TKCCP's financial results were not consolidated with TWC's financial results either.

• TKCCP was not a wholly-owned subsidiary of TWI.

• Time Warner Cable-Houston Division had its own independent board of six directors. The board of directors could, and did, reject budgets previously presented to and approved by TWC.

• TWC is a subsidiary of TWI, but TWC and TWI do not share common management.

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[4] Thanedar's offer of employment letter states he worked for Texas Cable Partners, L.P. which later became TKCCP. The Court notes Time Warner Cable-Houston Division ceased to exist in January 2007.

• TKCCP's management agreement provided that TWI's internal audit department would supply audit resources to TWC operating divisions, such as Time Warner Cable-Houston Division.

• TWI, the parent corporation, is the only party to this lawsuit that was publicly traded during Thanedar's employment with Time Warner Cable-Houston Division.

• TWI had no involvement, oversight, or input regarding employment decisions relating to salary, performance evaluations, and hiring and firing employees at Time Warner Cable-Houston Division.

• Moreover, Marla Barnard ("Barnard"), former Vice President of Human Resources ("HR") for Time Warner Cable-Houston Division, testified she never consulted TWI on any HR-related issue.

• Although Time Warner Cable-Houston Division employees received TWI stock options, TWC offered the stock options, not TWI.

• When eligible, Thanedar will receive pension benefits from TWC and TWE-AN, not TWI.

• Thanedar received no earnings from TWI.

4. In the spring of 2003, Thanedar applied for the position of Controller at Time Warner Cable-Houston Division. Thanedar did not receive the promotion. Instead, Richard Gray ("Gray"), an outside applicant, was hired as Controller.

5. On June 17, 2003, Thanedar filed a complaint with Barnard about his pay grade and salary. Thanedar asserted his pay grade and salary should be equal to or higher than the Controller position. According to Thanedar, the differences in grade and salary between the two positions was "discriminatory and not based on merit."

6. Barnard testified that she thoroughly investigated and researched Thanedar's allegations and concluded Thanedar's assigned pay grade and salary were correct based on his role and responsibilities.

7. On July 9, 2003, Thanedar filed an Open Door Review Request with McMillan complaining, *inter alia,* about process-improvements in his department.

8. On August 29, 2003, Thanedar again filed a complaint with Barnard and HR, this time requesting a formal written response "as to why [his] internal bid for the Controller's position was denied and a less experienced and less qualified candidate [was] favored."

9. After Barnard investigated Thanedar's new complaints, she informed him that Gray, a CPA, was selected for the Controller position because he had an MBA, a great deal of financial experience, including experience as Controller of a cable communications business, broad management and team-building experience, experience with a particular type of computer software, and strong interpersonal, analytical, and problem-solving skills.

10. On September 12, 2003, Thanedar filed a charge of discrimination ("Original Charge") with the Equal Employment Opportunity Commission ("EEOC"), asserting he was not promoted to Controller because of his Indian heritage.

11. On October 17, 2003, Fryer reprimanded Thanedar for excessive absences. Although Fryer was concerned about Thanedar's absenteeism, he was more concerned about Thanedar's primary method of communication: email. Fryer admonished Thanedar that more in-person communication was necessary.

12. On November 11, 2003, Thanedar filed an amended charge ("Amended Charge") of discrimination with the EEOC, alleging, *inter alia,* that Fryer unlawfully retaliated against him for filing the Original Charge by writing him up for attendance issues.

13. To improve communication between Fryer and Thanedar, Barnard set up a series of meetings between the two. Fryer and Thanedar agreed to meet weekly beginning the week of December 8, 2003. The meetings, however, did not improve communication between Thanedar and Fryer.

14. In December 2003, Fryer prepared and presented Thanedar with his performance evaluation for 2003.

15. In Thanedar's 2003 performance evaluation, Fryer questioned "whether [Thanedar] has the willingness to effectively resolve problems without creating other problems[,] and this leads me to question his judgment, problem solving abilities and communication skills." Moreover, Fryer observed that Thanedar:

• assumed a "narrow view of his job responsibilities";

• refused to accept responsibility for tasks assigned to him; and

• required "more structure" and direction than necessary.

16. Fryer asked Thanedar to review the 2003 performance evaluation over the Christmas vacation, and they agreed to meet to discuss the evaluation after the Christmas vacation, and they agreed to meet to discuss the evaluation after the holidays at a scheduled time. Thanedar did not attend the scheduled meeting.

17. On January 20, 2004, Thanedar met with Fryer and Barnard to discuss his 2003 performance evaluation. During

this meeting, Thanedar again complained of on-going harassment and discrimination.

18. Also, for the first time, Thanedar complained of alleged accounting irregularities within Time Warner Cable-Houston Division's finance department and called for a Sarbanes-Oxley review.

19. Specifically, Thanedar alleged that:

• accruals and related expenses for Road Runner Affiliate Fees, Taxes, and Legal Fees were not accurately recorded during the 2003 annual close process;

• Programming Expenses were misstated or not properly calculated;

• Accounts Payable and accrual accounts were not properly stated;
• Subscription Revenue was understated by $1 million for the year ended December 31, 2003;

• Subscription Revenue was not properly cut off during the 2003 close process;

• Pay-Per-View revenue was not accrued for in the period after the billing system close;

• Installation Revenue was not accounted for properly;

• Time Warner Cable-Houston Division did not consistently follow Corporate Accounting Policies;

• Internal Control Questionnaires were not being completed appropriately; and

• account reconciliations and journal entries were not adequately supported or documented.

20. Thanedar informed Fryer and Barnard that he intended to take further action regarding his allegations of financial irregularities.

21. Although there was a confidential hotline available to all Time Warner Cable-Houston Division employees, and the line was well-known to employees in January 2004, Thanedar directly telephoned Anthony DePaoli ("DePaoli"), former Director of Internal Audit for TWI. Thanedar relayed his aforementioned allegations to DePaoli on January 27, 2004.

22. DePaoli told Thanedar he wanted to schedule a formal meeting to discuss Thanedar's complaints.

23. On January 29, 2004, DePaoli and Steve Fiedler, Vice President of Internal Audit for TWI, conducted a conference call with Thanedar to listen to his complaints.

24. As previously noted, DePaoli testified that TKCCP's management agreement provided that TWI's internal audit department would supply audit resources to TWC operating divisions, such as Time Warner Cable-Houston Division, that did not have internal auditors.

25. On February 10, 2004, based on Thanedar's allegations of accounting irregularities, a team of auditors, including DePaoli, traveled to Time Warner Cable-Houston Division to perform audit tests to either corroborate or refute the allegations. The audit took several weeks to perform.

26. When DePaoli and the audit team were in Houston investigating Thanedar's original allegations, Thanedar raised new allegations of financial irregularities. To be prudent, DePaoli expanded his investigation beyond Thanedar's initial complaints to encompass the new allegations.

27. DePaoli testified that after conducting the audit:

• he "could not corroborate the allegations being made";

• there was "no evidence of any intentional deception";

• he "did not conclude the journal entries and reversing journal entries were inappropriate or there was any ill intent"; and

• no misstatements regarding revenue existed.

28. DePaoli informed Ernst & Young, L.L.P., external auditors for TWI, of the allegations and resulting investigation so that it could ensure the financial accuracy of the report. DePaoli also informed executives of TWC about the audit investigation and results.

29. In his report summarizing the audit results, DePaoli identified Thanedar as the employee who made the allegations of financial irregularities.

30. Although DePaoli testified it was not necessary to identify Thanedar in the report, he explained Thanedar himself made little effort at maintaining confidentiality. For example, Thanedar did not avail himself of the confidential hotline that was available to him, he directly informed Fryer, Barnard, and DePaoli of his allegations, and he continued to make allegations of financial irregularities to other employees within the office.

31. Procedures for handling Sarbanes-Oxley "whistleblower" complaints existed in January 2004, and DePaoli testified he abided by and followed the procedures.

32. On March 12, 2004, Thanedar complained to Fryer about his 2003 Houston Incentives Plan ("HIP") scores. Fryer did not rate Thanedar at 100% for all areas because he did not fulfill his stated objectives. As a result, Fryer docked Thanedar's bonus for 2003. Fryer testified that:

• he rated Thanedar at 70% for Leadership Program because Thanedar missed two key meetings;

• he rated Thanedar at 80% for Internal Training and Development for Accounting and Finance because Thanedar did not invite outside speakers to speak at quarterly meetings as instructed;

• he rated Thanedar at 50% for the HEROES project because Thanedar's "involvement in that project was minimal at best."

33. On April 29, 2004, less than two months after DePaoli conducted the investigative audit of the Time Warner Cable-Houston Division, Thanedar sent an email to McMillan calling for a second Sarbanes-Oxley review of Time Warner Cable-Houston Division's revenues.

34. McMillan testified Thanedar's accusations were "groundless," "unfounded," "irresponsible," and "not acceptable behavior" in light of the fact that DePaoli had just performed an audit based on Thanedar's original complaints and found no irregularity.

35. According to McMillan, Thanedar was attempting a "resurrection" of his original financial irregularity claims despite the fact that the audit refuted such claims.

36. No Time Warner Cable-Houston Division employee, other than Thanedar, ever made allegations of financial wrongdoing.

37. In April 2004, Fryer formally reprimanded Thanedar for violating Minor Work Rule Number 7, Major Work Rule Number 12, and Major Work Rule Number 16. According to Fryer's written reprimand, Thanedar:

• failed timely to complete documentation for reconciling courtesy accounts on two occasions, once in January 2004 and again in March 2004;[5]

• "repeatedly postponed or avoided completing assigned work, indicating that the responsibility for such work does not fall in his area"; and

• exhibited disruptive behavior that interrupted office operations and "caused morale problems within and among departments."

38. Fryer testified Thanedar did not communicate, or refused to communicate with Gray, Controller of Time Warner Cable-Houston Division. According to Fryer, it was extremely important that Thanedar and Gray "work hand in glove." However, the relationship between Thanedar and Gray was "strained."

39. For example, Gray emailed Thanedar and Barbara Thomas ("Thomas"), Director of Procurement for Time Warner Cable-Houston Division, the week of July 5, 2004, requesting their input and suggestions on an office reconfiguration project. As of July 16, 2004, only Thomas had responded to Gray's request. Thus, Gray asked Thanedar to provide the requested information no later than July 19, 2004.

40. On July 19, 2004, rather than respond to Gray with his input as requested, Thanedar emailed Fryer, informing him that he was "concerned" about the way Gray was handling the re-configuration project.

41. Thanedar also had trouble communicating with subordinate employees.

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[5] As of the date of the reprimand, Fryer still had not received the requested information, and Fryer testified at trial that he never received it.

42. Barnard testified that Su-Lyan McArthur ("McArthur"), a financial analyst for Time Warner Cable-Houston Division, was "distraught," "crying and very upset" over an email Thanedar sent her on July 14, 2004.

43. In this email, Thanedar reprimanded McArthur and copied Fryer on it. Barnard testified that the "public shaming" nature of the email troubled her because it demonstrated Thanedar was not effectively using communication designed to improve an employee's performance.

44. Thanedar continued to have difficulty providing requested information through September 2004. Specifically, Gray testified Thanedar did not provide him with information related to the close process in a timely manner. Likewise, Fryer testified Thanedar did not timely communicate details of budget changes.

45. In October 2004, based upon Thanedar's ongoing and uncorrected performance issues, Fryer decided to terminate Thanedar's employment with Time Warner Cable-Houston Division because he failed to meet performance expectations. TWI had no input on this decision, but Fryer sought Barnard's approval.

46. Barnard testified HR approved the decision to terminate Thanedar's employment after reviewing his performance evaluations, the corrective actions from October 2003 and April 2004, and documentation regarding his interactions with other employees and failure to meet deadlines. She did not consult with anyone at TWI about Thanedar's job performance or his ultimate termination of employment."[6]

47. Barnard testified that in order to receive a bonus, an employee must begin employment with Time Warner Cable-

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[6] Barnard testified she consulted with an in-house attorney for TWC about Thanedar's termination because Time Warner Cable-Houston Division had no legal department of its own.

Houston Division by the end of June of the relevant year and remain on the payroll through the end of that year.

48. According to Barnard, Time Warner Cable-Houston Division offered Thanedar a severance package at the time of his termination, and that she had the discretion to offer him some form of compensation while he searched for a new job. Thus, Barnard prorated Thanedar's 2004 bonus and offered him $14,634.11 not as a bonus, but instead as part of his severance package.

49. Barnard testified Thanedar did not receive the proffered $14,634.11 because he refused to sign off on a release of liability and the severance package.

50. During his direct examination of himself, Thanedar testified that:

• he was mostly supervised by TWC management,

• Fryer was his direct supervisor after 2001;

• he consistently exceeded expectations as an employee;

• he communicated with Gray and did not know Gray was unhappy;

• Time Warner Cable-Houston Division fired him without any warning and based on no prior disciplinary actions;

• Fryer refused to communicate with him;

• he got a bad reputation at Time Warner Cable-Houston Division because he complained about financial irregularities;

• TWI, the parent company, received all the financial information;

• he received pension benefits and stock options from TWI;[7]

• he is entitled to $245,000 in back wages, $156,000 in benefits, $626,00 in future pay, $1,000,000 in reputational damages, and $25,000 for an unpaid bonus.[8]

CONCLUSIONS OF LAW

51. The Court has subject matter jurisdiction over Thanedar's Sarbanes-Oxley claim pursuant to 18 U.S.C. § 1514A *et seq.*

52. The Court has supplemental jurisdiction over Thanedar's state law claims pursuant to 28 U.S.C. § 1367.

53. Venue is proper pursuant to 28 U.S.C. § 1391.

SARBANES-OXLEY WHISTLEBLOWER CLAIM

54. Thanedar first brings a claim under Section 806 of the Sarbanes-Oxley Act, 18 U.S.C. § 1514A.

55. Although Thanedar worked at Time Warner Cable-Houston Division, Thanedar contends TWI, the parent corporation, actually employed him or had the ability to affect the terms and conditions of his employment at Time Warner Cable-Houston Division. Because TWI is a publicly traded entity subject to Sarbanes-Oxley, and because TWI allegedly controlled the terms and conditions of his employment (i.e. his termination of employment) at Time Warner Cable-Houston Division, Thanedar contends Defendants are liable under Sarbanes-Oxley.

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[7] On cross-examination, Thanedar testified he will receive pension benefits solely from TWC and TWE-AIN, not TWI. Also, TWC, not TWI, offered Thanedar the stock options.

[8] The Court notes it allotted Thanedar fourteen hours to present his case. When fourteen hours elapsed, the Court granted Thanedar more time for his case and for rebuttal.

56. Defendants argue the Court lacks subject matter jurisdiction over Thanedar's Sarbanes-Oxley claim because no publicly traded entity employed him or affected the terms of his employment, and therefore, no cause of action exists under Sarbanes-Oxley. Assuming, *arguendo,* Thanedar establishes Sarbanes-Oxley coverage, Defendants contend Thanedar's Sarbanes-Oxley claim is barred by *res judicata,* Thanedar failed to present evidence establishing a Sarbanes-Oxley "whistleblower" claim, and Thanedar failed to exhaust his administrative remedies as to all Defendants.

A. Coverage Under Sarbanes-Oxley

57. Sarbanes-Oxley protects employees of public companies from retaliation for engaging in certain "whistleblowing activities." *Brady v. Calyon Sec. (USA),* 406 F. Supp. 2d 307,317 (S.D.N.Y. 2005).

58. Under Sarbanes-Oxley, a covered entity may not "discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee." *Id.* (quoting 18 U.S.C. § 1514A(a)).

59. "The Sarbanes-Oxley Act creates 'whistleblower' protection for employees of publicly-traded companies by prohibiting employers from retaliating against employees because they provided information about potentially unlawful conduct." *Welch v. Chao,* 536 F.3d 269, 275 (4th Cir. 2008).
60. Sarbanes-Oxley, however, applies only to: (1) public companies that are issuers of a class of securities registered under Section 12 of the Securities and Exchange Act of 1934; or (2) public companies that are issuers of securities required to file reports under Section 15(d) of the Securities Exchange Act of 1934 and/or officers, employees, contractors, subcontractors, or agents of such companies. *Brady,* 406 F. Supp. 2d at 317. "A specific requirement, therefore, is that [the] defendant be a publicly traded company." *Id.*

61. An employee of a subsidiary is a covered employee for Sarbanes-Oxley purposes where the officers of the publicly-traded parent company have the authority to affect the employment of the subsidiaries' personnel. *Ciavarra v. BMC Software, Inc.*, Civ. A. No. H-07-0413, 2008 WL 352273, at *3 (S.D. Tex. Feb. 7, 2008) (citing *Carnero v. Boston Scientific Corp.*, 433 F.3d 1,6 (1st Cir. 2006)).

62. Thanedar carries the burden of proving, through legally sufficient evidence, that Defendants are publicly-traded companies.[9] *See id.* (indicating the plaintiff carries the burden of proffering sufficient evidence to establish "covered employee" status).

63. Thanedar proffered no legally sufficient evidence at trial that TKCCP, the entity that owned Time Warner Cable-Houston Division, was a public company that issued securities registered under Section 12 of the Securities and Exchange Act of 1934, or that it was an issuer of securities required to file reports under Section 15(d) of the Securities and Exchange Act of 1934. *See Brady,* 406 F. Supp. 2d at 317.

64. Moreover, there is no legally sufficient evidence that TWC, TWE-A/N, TWCH, and TWE were publicly-traded companies and subject to Sarbanes- Oxley coverage at the time of Thanedar's employment with Time Warner Cable-Houston Division. *See id.*

65. Although TWI is a publicly-traded corporation, Thanedar proffered no legally sufficient evidence to support his conclusory allegations that TWI, the publicly-traded parent corporation, actually employed him or, alternatively, that the officers of TWI had the authority to affect his employment at Time Warner Cable-Houston Division. *See Ciavarra,* 2008 WL 352273, at *3.

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[9] Thanedar conceded during the May 23, 2008 final pretrial conference that he carried the burden of proving coverage under Sarbanes-Oxley.

66. On the contrary, the evidence demonstrates:

• Thanedar's offer of employment letter stated he worked for Texas Cable Partners, L.P., which later became TKCCP, not TWI;

• Thanedar received stock options from TWC, not TWI;

• Thanedar will not receive pension benefits from TWI;

• Thanedar received no earnings from TWI; and

• TWI had no involvement, oversight, or input regarding employment decisions relating to salary, performance evaluations, and hiring and firing employees at Time Warner Cable-Houston Division.

67. Likewise, there is no legally sufficient evidence that TKCCP, TWC, TWE-A/N, TWCH, and TWE acted as agents of TWI.

68. Moreover, the Court finds there is no legally sufficient evidence to establish that TWI and the other Time Warner Defendants were Thanedar's joint or integrated employers.

69. Thanedar's unsubstantiated opinions to the contrary are simply not competent evidence, and to the extent Thanedar's testimony contradicted that of other witnesses, the Court finds Thanedar's testimony less credible.

70. In sum, Thanedar did not meet his burden to establish a publicly-traded company, as that term is defined by Sarbanes-Oxley, employed him or affected his employment at Time Warner Cable-Houston Division. *See Brady*, 406 F. Supp. 2d at 317; *Ciavarra*, 2008 WL 352273, at *3. Because Thanedar failed to establish coverage, the Court finds Thanedar cannot prevail on his Sarbanes-Oxley claim.

B. Res Judicata

71. Assuming, *arguendo,* Sarbanes-Oxley coverage exists, Defendants contend Thanedar's Sarbanes-Oxley claim is nevertheless barred by *res judicata.* [10]

72. Res judicata, or claim preclusion, bars the litigation of claims that either have been litigated or should have been raised in an earlier lawsuit. *In re Southmark Corp.,* 163 F.3d 925,934 (5th Cir. 1999).

73. For *res judicata* to operate as a bar to a claim, four elements must be satisfied: (l) the parties in both the prior suit and the current suit must be identical; (2) a court of competent jurisdiction must have rendered the prior judgment; (3) the prior judgment must have been final and on the merits; and (4) the plaintiff must raise the same cause of action in both suits. *Id.*

74. When all four elements are present, claim preclusion prohibits either litigant from asserting "any claim or defense in the later action that *could have been raised* in support of or in opposition to the cause of action asserted in the prior action." *United States v. Shanbaum,* 10 F.3d 305, 310 (5th Cir. 1994) (emphasis added).

75. As previously noted, Thanedar's First Lawsuit against Defendants involved alleged violations of Title VII. Defendants in the current lawsuit, or Second Lawsuit, were Defendants in the First Lawsuit. Thus, regarding the first element of *res judicata,* the Court finds the parties in the Second Lawsuit and the parties in the First Lawsuit are identical. *See In re Southmark Corp.,* 163 F.3d at 934.

76. Moreover, the second element of *res judicata* is satisfied because the court in the First Lawsuit, the United States District Court for the Southern District of Texas, is a court of competent jurisdiction. *See id.*

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[10] Defendants also contend Thanedar's breach of contract claims are likewise barred by *res judicata* because they are based on his termination of employment and could have been raised in the First Lawsuit.

77. Likewise, the third element of *res judicata* is established because the court dismissed the First Lawsuit with prejudice pursuant to Federal Rule of Civil Procedure 41 (b). Because "a Rule 41 (b) dismissal constitutes a final judgment on the merits," the Court finds the First Lawsuit was a final judgment on the merits. *See Vance v. W.G. Yates & Sons Const. Co.*, 974 F. Supp. 879, 882 (N.D. Miss. 1997) (citing *Colle v. Brazos County, Tex.*, 981 F.2d 237, 242-43(5th Cir. 1993)). *See also Leon v. IDX Sys. Corp.*, 464 F.3d 951, 962 (9th Cir. 2006) (noting that "a dismissal with prejudice is a determination on the merits").

78. As for the fourth element of *res judicata*, the Court must determine whether Thanedar raised the same cause of action in the First Lawsuit and the Second Lawsuit. *See In re Southmark Corp.*, 163 F.3d at 934.

79. To determine whether claims alleged in a lawsuit are the "same cause of action," courts apply the transactional test. *Id.* Under the transactional test, the court focuses on whether the two cases under consideration are based on "the same nucleus of operative facts." *Id* (quoting *In re Baudoin*, 981 F.2d 736, 743 (5th Cir. 1993)). The nucleus of operative facts, rather than the relief requested, substantive theories advanced, or types of rights asserted, defines the claim. *Agrilectric Power Partners, Ltd. v. Gen. Elec. Co.*, 20 F.3d 663,665 (5th Cir. 1994).

80. If the cases are based on the same nucleus of operative facts, the prior judgment's preclusive effect "extends to all rights the original plaintiff had 'with respect to all or any part of the transaction, or series of connected transactions, out of which the [original] action arose. '" *Petro-Hunt v. United States*,365 F.3d 385, 395 (5th Cir. 2004) (citing RESTATEMENT(SECOND) OF JUDGMENTS§ 24(1)).

81. The facts and ultimate issues in both of Thanedar's lawsuits are virtually identical. In the First Lawsuit, Thanedar

claimed Defendants violated Title VII by discriminating and retaliating against him through various adverse employment actions, including his ultimate termination. In the Second Lawsuit, Thanedar likewise claims Defendants violated Sarbanes-Oxley by retaliating against him through various adverse employment actions, including his ultimate termination.

82. Thus, Thanedar essentially asserts, albeit through different legal theories, that he suffered an adverse employment action and that his employer ultimately terminated his employment because of its illegal and retaliatory motives.

83. The Court finds that both the First Lawsuit and Second Lawsuit's claims focus on one critical issue: whether Thanedar' s employer had a legitimate and lawful reason for taking the adverse employment action of which he complains. *See Leon,* 464 F.3d at 962 (finding Sarbanes-Oxley claim, Title VII retaliation claim, and False Claims Act claim arose of out the same nucleus of operative facts); *see also Nelson v. AMX Corp.,* No. Civ. A. 3:04CV1350-H, 2005 WL 2495343, at *6 (N.D. Tex. Sept. 22, 2005) (dismissing lawsuit and explaining that the same nucleus of operative fact existed between an employee's employment contract claim and subsequent discrimination claim as "they [arose] at the same time among the same players at the same events-the termination of [plaintiff' s] employment and the interactions leading up to it").

84. Therefore, because the Court finds that the claims asserted in the First and Second Lawsuits are based on the same nucleus of operative facts, *res judicata* bars Thanedar's Sarbanes-Oxley claim. [11] *See In re Southmark Corp.,* 163 F.3d at 934.

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[11] The Court also finds the same rationale applies to Thanedar's remaining breach of contract and Texas Payday Law claims because they are based on the same nucleus of operative facts. Because Thanedar could have

C. Sarbanes-Oxley Discrimination

85. Assuming, *arguendo*, Sarbanes-Oxley coverage exists and *res judicata* does not preclude Thanedar's claim, Defendants contend Thanedar failed to present legally sufficient evidence establishing a Sarbanes-Oxley "whistleblower" claim.

86. To establish a Sarbanes-Oxley "whistleblower" claim, Thanedar must prove by a preponderance of the evidence that: (1) he engaged in protected activity; (2) the employer knew he engaged in protected activity; (3) he suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable action. *See Allen v. Admin. Rev. Bd.*, 514 F.3d 468, 476 (5th Cir. 2008).

87. Not all complaints about work-related issues are protected by Sarbanes-Oxley. An employee's complaint must definitively and specifically relate to one of six enumerated categories found in 18 D.S.C. § 1514A: (1) 18 D.S.C. § 1341 (mail fraud); (2) 18 D.S.C. § 143 (wire fraud); (3) 18 D.S.C. §1344 (bank fraud); (4) 18 D.S.C. § 1348 (securities fraud); (5) any rule or regulation of the SEC; or (6) any provision of federal law relating to fraud against shareholders. *Id.* at 476-77.

88. As previously discussed, Thanedar complained about accounting irregularities, improperly recorded revenues and expenses, and weaknesses of internal controls. Thanedar reported his concerns to DePaoli, the internal auditor. DePaoli conducted an expansive audit to corroborate or refute Thanedar's allegations, and he determined Thanedar's allegations were unfounded.

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raised these claims in the First Lawsuit, they are similarly barred by *res judicata*.

89. The Court finds there is no legally sufficient evidence to establish that the concerns raised by Thanedar related to or constituted mail fraud under 18 U.S.C. § 1341, wire fraud under 18 D.S.C. § 1343, bank fraud under 18 U.S.C. § 1344, securities fraud under 18 U.S.C. § 1348, any rule or regulation of the SEC, or any provision of federal law relating to fraud against shareholders. *See id.*

90. Moreover, the Court finds there is no legally sufficient evidence that Thanedar's complaints were objectively reasonable. *See Allen*, 514 F.3d at 477.

91. Even if Thanedar's complaints constituted protected activity and were objectively reasonable, which the Court determines they were not, Thanedar presented no legally sufficient evidence that his complaints about alleged accounting irregularities were a contributing factor in any adverse employment action taken by Defendants. *See id.* at 476.

92. Both Fryer and Barnard testified Time Warner Cable-Houston Division terminated Thanedar's employment because he consistently failed to meet performance expectations despite corrections and suggestions for improvement, not because he complained about financial irregularities. Defendants produced numerous witnesses and exhibits demonstrating Thanedar's persistent inability--or refusal-to cooperate and communicate with his co-workers, follow directions, and accept responsibility for assignments.[12]

93. To the extent Thanedar's testimony contradicts that of another witness, the Court finds Thanedar's testimony less credible.

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[12] Likewise, no temporal proximity exists between Thanedar's termination and his complaints of financial irregularities. Thanedar complained about alleged financial irregularities in January 2004, and Time Warner Cable-Houston Division terminated his employment ten months later in October 2004.

94. Because there is no legally sufficient evidence that Thanedar's complaints of alleged accounting irregularities related to any of the six enumerated categories protected by Sarbanes-Oxley, were objectively reasonable, and were a contributing factor in any adverse employment action taken by Defendants, the Court finds Thanedar fails to establish a Sarbanes-Oxley "whistleblower" claim. *See id.*

D. Failure to Exhaust Administrative Remedies

95. Assuming, *arguendo,* Sarbanes-Oxley coverage exists, *res judicata* does not preclude Thanedar's claim, and Thanedar presented legally sufficient evidence establishing a Sarbanes-Oxley "whistleblower" claim, Defendants contend Thanedar failed to exhaust his administrative remedies as to all Defendants.

96. Prior to filing a Sarbanes-Oxley lawsuit, a plaintiff must first file an administrative complaint with the Department of Labor's Occupational Safety and Health Administration Division ("OSHA") and "afford OSHA the opportunity to resolve the allegations administratively." *Hanna* v. *WCI Cmtys., Inc.*, 348 F. Supp. 2d 1322, 1326 (S.D. Fla. 2004).

97. A party who is not named in an administrative charge may not later be sued in federal court. *See Mann v. Gannett Co.*, Civ. A. No. 2:06CV888-MHT, 2007 WL 1668835, at *3 (M.D. Ala. June 8, 2007) (dismissing employee's Sarbanes-Oxley complaint because of her failure to file a complaint with OSHA); *Khan v. United Recovery Sys., Inc.*, Civ. A. No. H-03-2292, 2005 WL 469603, at *6 (S.D. Tex. Feb. 28, 2005) (citing *Way* v. *Mueller Brass Co.*, 840 F.2d 303, 307 (5th Cir. 1988)).

98. After the close of all the evidence, Defendants stated on the record that Thanedar filed the required administrative complaint with OSHA against Defendants TWI and TWC.

99. Thanedar, however, presented no evidence at trial that he filed the required administrative complaint against Defendants TKCCP, TWE-A/N, TWCH, and TWE.

100. Because Thanedar failed to present any evidence at trial that Defendants TKCCP, TWE-A/N, TWCH, and TWE were named as parties to the OSHA complaint, the Court finds Thanedar failed to exhaust his administrative remedies as to these Defendants. Accordingly, Thanedar cannot prevail on his Sarbanes-Oxley claim against Defendants TKCCP, TWE-A/N, TWCH, and TWE. *See Hanna,* 348 F. Supp. 2d at 1326; *Mann,* 2007 WL 1668835, at *3.

BREACH OF CONTRACT CLAIM

101. Thanedar next asserts a breach of contract claim against Defendants. According to Thanedar, certain policies and standards of business conduct promulgated by his employer functioned as an express limitation on his at-will employment status and prohibited his termination.

102. Defendants respond that Thanedar was an at-will employee, and he cannot recover for breach of contract because he presented no evidence proving an express agreement to alter his at-will status.

103. Absent an express agreement to the contrary, Texas provides for employment at-will, terminable at any time by either party, with or without cause. *Fed. Express Corp. v. Dutschmann,* 846 S.W.2d 282,283 (Tex. 1993); *E. Line & Red River R.R.* v. *Scott,* 10 S.W. 99, 102 (Tex. 1888).

104. A discharged employee who asserts that the parties contractually agreed to limit the employer's right to terminate an at-will employee has the burden of proving an express agreement or written representation to that effect. *Lee-Wright, Inc.* v. *Hall,* 840 S.W.2d 572, 577 (Tex. App.-Houston [1st Dist.] 1992, no writ).

105. Written representations in employee handbooks do not give rise to contractual obligations under Texas law where the handbook or policy manual contains a disclaimer. *Dutschmann,* 846 S.W.2d at 283. Such a disclaimer negates any implication that a personnel procedures manual places a restriction on the employment at-will relationship. *Id.; Shell Oil Co. v. Humphrey,* 880 S.W.2d 170,176 (Tex. App.-Houston [14th Dist.] 1994, writ denied).

106. At trial, Thanedar admitted his employment status at Time Warner Cable-Houston Division was at-will. Moreover, exhibits introduced at trial reinforced his at-will employment status and confirmed that no other policy, handbook provision, or other document altered his employment status.[13]

107. Thanedar presented no legally sufficient evidence that his employer expressly agreed to or made any written representation that limited its right to terminate Thanedar, an at-will employee.

108. Thus, because Thanedar proffered no evidence of a valid written, oral, or statutory modification of his at-will employment status-other than his own conclusory assertions and testimony-the Court finds Thanedar's breach of contract claim fails as a matter of law,[14] *See Lee- Wright, Inc.,* 849 S.W.2d at 577.

TEXAS PAYDAY LAW CLAIM

109. Thanedar also asserts a claim against Defendants for an alleged unpaid bonus. According to Thanedar, he is entitled

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[13] Indeed, one policy provided, "Nothing contained in this policy shall diminish the company's right to discharge any employee for any reason. The company reserves the right to take disciplinary action whenever appropriate." *See Dutschmann,* 846 S.W.3d at 283.

[14] The Court reiterates Thanedar's breach of contract claim is also barred by *res judicata*

to recover a bonus for the year 2004 in the amount of $25,000.

110. Defendants respond Thanedar is not entitled to a bonus because he was fired prior to the end of the plan year. Thus, Defendants aver Thanedar was entitled only to severance pay, not a bonus.

111. The Texas Payday Law, codified at TEX. LAB. CODE ANN. § 61.001 *et seq.*, provides that "[w]ages paid on commission and bonuses are due according to the terms of ... an agreement between the employee and the employer ...." TEX. LAB. CODEANN. § 61.015(a).

112. Time Warner Cable-Houston Division's incentive bonus plan ("Discretionary Houston Incentive Plan" or "HIP") provided for payment of an incentive bonus, if earned, to employees who remained in the company's employ at the end of the plan year.

113. The HIP, however, also provided that if the company terminated an employee's employment, and the company severance policy covered the employee, the severance policy governed with respect to any payments under the HIP.

114. Barnard testified at trial that Thanedar was eligible to participate in the severance pay plan. The severance pay plan, however, contained no provision or requirement for payment of any bonus.

115. Although Barnard offered Thanedar severance pay in accordance with the severance pay plan, Thanedar refused to accept the terms of the severance agreement.

116. Because Time Warner Cable-Houston Division terminated Thanedar's employment, and the severance pay plan covered Thanedar, the Court finds he was therefore entitled to severance pay benefits, not the HIP bonus.

117. The Court finds Barnard complied with the severance pay plan's terms and offered Thanedar a severance pay package, which he declined to accept. Thus, the Court finds Thanedar's Texas Payday Law claim fails.[15]

DAMAGES

118. Thanedar seeks $245,000 in back wages, $156,000 in benefits, $626,000 in future pay, and $1,000,000 in reputational damages.

119. Thanedar alone testified about his alleged damages. He introduced no evidence to support his claims and no expert testimony. [16]

120. Because Thanedar presented no evidence or expert testimony to support his assertion that he is entitled to $245,000 in back wages, $156,000 in benefits, $626,000 in future pay, and $1,000,000 in reputational damages, the Court finds his claim for damages fails.[17] *See In re Air Crash Disaster at New Orleans, La.*, 705 F.2d 1230, 1235 (5th Cir. 1986) ("An award for damages cannot stand when the only evidence to support it is speculative or purely conjectural.").

CONCLUSION

Given the foregoing, the Court hereby

ORDERS that Plaintiff Chandrashekhar B. Thanedar's claims against Defendants are DISMISSED WITH PREJUDICE. Plaintiff shall take nothing from

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[15] The Court reiterates Thanedar's Texas Payday Law claim is also barred by *res judicata*.

[16] Although Thanedar had no expert witness on damages ready to testify, the Court gave Thanedar the opportunity to call his damages expert out of order later in the trial. Despite this accommodation, Thanedar elected to proceed without calling a witness and testify himself as to his alleged damages.

[17] Moreover, Sarbanes-Oxley does not allow recovery for reputational damages. *Murray*, 2005 WL 1356444, at *3.

Defendants. The Court further

ORDERS that until such time as the Court may otherwise order, Thanedar, or any individual acting on his behalf, is hereby ENJOINED from filing any action, complaint, or motion that directly or tangentially raises an issue alleged in cause numbers H-04-4188 or H-06-2139 in this Court without first obtaining leave of Court from the Chief Judge of the United States District Court for the Southern District of Texas. Any new motions, complaints, or action which Thanedar seeks to file in this Court will not be docketed until the Chief Judge of the United States District Court for the Southern District of Texas grants Thanedar written leave to file. The Court further

ORDERS that any new motion, complaint, or action which Thanedar, or any individual acting on his behalf, seeks to file in this Court shall be accompanied by a Motion for Leave to File Complaint/Motion. The Clerk of this Court shall forward such action and motion to the Chief Judge of the United States District Court for the Southern District of Texas for submission of the motion. The Court further

ORDERS that failure of Thanedar to comply with this Order, or continuous filing of any vexatious and/or frivolous complaints, motions, or actions raising similar issues addressed in the above referenced cases, may result in the imposition of sanctions and/or a contempt citation. The Court further

ORDERS that a copy of this Order shall be forwarded to the Clerk of the Court.

SIGNED at Houston, Texas, on this 7 day of October, 2008.

sd/

DAVID HITTNER
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CHANDRASHEKHAR B. THANEDAR	§	
Plaintiff,	§	
v.	§	CIVIL ACTION NO.
	§	H-06-2139
TIME WARNER, INC., TIME WARNER CABLE, INC., TEXAS AND KANSAS CITY CABLE PARTNERS, L.P., TIME WARNER ENTERTAINMENT-ADVANCE/NEWHOUSE PARTNERSHIP, TIME WARNER COMMUNICATIONS OF HOUSTON, L.L.P., AND TIME WARNER ENTERTAINMENT COMPANY, L.P.,	§	
Defendants.	§	

FINAL JUDGMENT

As the Court has entered its findings of fact and conclusions of law in the above-referenced matter, the Court hereby

ORDERS that final judgment be entered in favor of Defendants Time Warner, Inc., Time Warner Cable, Inc., Texas and Kansas City Cable Partners, L.P., Time Warner Entertainment-Advance/Newhouse Partnership, Time Warner Communications of Houston, L.L.P., and Time Warner Entertainment Company, L.P. in accordance with the Court's findings of fact and conclusion of law.

Appendix D

Plaintiff Chandrashekhar B. Thanedar's Sarbanes-Oxley, breach of contract, and Texas Payday Law claims are dismissed.

Accordingly, Plaintiff shall take nothing from Defendants.

THIS IS A FINAL JUDGMENT.

SIGNED at Houston, Texas, on this 7 day of October, 2008.

sd/
David Hittner
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CHANDRASHEKHAR B. THANEDAR	§	
	§	
Plaintiff,	§	
VS.	§	CIVIL ACTION NO.
	§	H-06-2139
TIME WARNER, INC., *et al*,	§	
	§	
Defendants.	§	

ORDER

Before the Court is the defendants' motion to secure certain depositions by telephone and the plaintiff's response. Without restating the arguments, the Court determines that telephonic depositions do not satisfy the Court's Order or expectations. Therefore, it is

Ordered that the defendants produce the designated witnesses at any location with the *provisio* that the expenses of transportation and lodging for the witnesses or counsel. Regarding the deposition of Tracy Harvill, the Court Orders that the deposition be taken in Corpus Christi, Texas, each party to bear his/its own expenses.

SIGNED and ENTERED this 20th day of December, 2007.

sd/
Kenneth Hoyt
United States District Judge

Appendix E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CHANDRASHEKHAR B. THANEDAR	§	
	§	
Plaintiff,	§	
v.	§	CIVIL ACTION NO.
	§	4:06-CV-02139
TIME WARNER, INC., ET AL,	§	
	§	
Defendants.	§	

ORDER ON MOTION FOR DEEMED ADMISSIONS

On this day, came on for consideration plaintiff's motion for deemed admissions and defendants' response to the motion. Upon consideration of the motion, defendants' response, and the record, the Court finds that the plaintiff's motion should, in all things, be GRANTED.

It is, therefore, ORDERED, ADJUDGED, AND DECREED that plaintiff's motion for deemed admissions is GRANTED and plaintiff's First and Second Requests for Admissions Directed to Defendants are deemed admitted in their entirety.

ENTERED this 14th day of May, 2008 at Houston, Texas.

sd/
Hon. Kenneth M. Hoyt
United States District Judge

Appendix F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CHANDRASHEKHAR B. THANEDAR	§	
Plaintiff,	§	
v.	§	CIVIL ACTION NO.
	§	4:06-CV 02139
TIME WARNER, INC., TIME WARNER CABLE, INC., TEXAS AND KANSAS CITY CABLE PARTNERS, L.P., TIME WARNER ENTERTAINMENT-ADVANCE /NEWHOUSE PARTNERSHIP, TIME WARNER COMMUNICATIONS OF HOUSTON, L.L.P., AND TIME WARNER ENTERTAINMENT COMPANY, L.P.,	§	
Defendants.	§	

ORDER

Came on for consideration Defendant's Motion for Reconsideration, or in the Alternative, Motion to Withdraw and/or Amend Admissions with respect to the above-referenced matter. Upon consideration of said Motion and the arguments and briefs, if any, of the parties, the Court finds that Defendants' Motion should be DENIED.

Houston, Texas, this 20th day of May, 2008.

sd/

Kenneth Hoyt
United States District Judge

Appendix G

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CHANDRASHEKHAR B. THANEDAR	§	
Plaintiff,	§	
v.	§	CIVIL ACTION NO.
	§	4:06-CV 02139
TIME WARNER, INC., TIME WARNER CABLE, INC., TEXAS AND KANSAS CITY CABLE PARTNERS, L.P., TIME WARNER ENTERTAINMENT-ADVANCE /NEWHOUSE PARTNERSHIP, TIME WARNER COMMUNICATIONS OF HOUSTON, L.L.P., AND TIME WARNER ENTERTAINMENT COMPANY, L.P.,	§	

Defendants.

ORDER

Came on for consideration Defendant's Motion for Continuance with respect to the above-referenced matter. Upon consideration of said Motion, the Court finds that Defendants' Motion should be denied.

It is, therefore, ORDERED, ADJUDGED and DECREED that Defendants' Motion for Continuance is, in all things DENIED.

Houston, Texas, this 20th day of May, 2008.

sd/

Kenneth Hoyt
United States District Judge

Appendix II

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

United States Courts
Southern District of Texas
F I L E D
JUL 27, 2005
MICHAEL N MILBY, CLERK OF COURT

CHANDRASHEKHAR B. THANEDAR Plaintiff,	§	
v.	§	C. A. NO. H-04-4188
TIME WARNER, COMMUNICATIONS OF HOUSTON, L.L.P.; TEXAS AND KANSAS CITY CABLE PARTNERS, L.P.; TIME WARNER CABLE INC.; ET AL. Defendants.	§	JUDGE MELINDA HARMON

MOTION TO DEFER PROCEEDINGS AND RESET SCHEDULING

Chandrashekhar "Chris" B. Thanedar, Plaintiff (Movant), in the above entitled and numbered cause and requests this Court to defer proceedings for ninety days and reset scheduling at a later date upon Plaintiff obtaining representation. In support of his motion, Plaintiff shows this Court as follows:

1. The scheduling conference set for May 10, 2005 became and was used as the conference to hear the withdrawal motion by Mr. Joe Ahmad and Ahmad, Zavitsanos & Anaipakos ("prior attorney").

2. The prior attorney filed a letter (Exhibit A) with Ms. Tippen, Case Manager, for the Court one day before the scheduling conference of May 10, 2005.

Appendix I

The withdrawal motion was heard on May 10, 2005.

3. Movant was not notified of the above.

4. Movant and his interests were not represented at the scheduling conference by virtue of the intent and actions of the prior attorney. The withdrawal motion heard at the subject conference was granted.

5. As a result of 1-4, Movant's interests and scheduling needs relevant to Movant's SOX (Sarbanes-Oxley Act of 2002) Whistleblower (Section 806) case against the Time Warner defendant companies were not represented at the conference.

6. The case referred above in item number 5 is SOX case no.6-3280-05-904 filed on January 18, 2005 and supplemented on January 19, 2005 with OSHA.

7. The SOX case no. 6-3280-05-904 mentioned above involves 26 charges of accounting and internal control irregularities and manipulation of financial statements and statistical reporting which affected shareholders' interests and violated relevant rules and regulations of regulatory bodies.

8. Movant wanted to before, and still wishes to remove the SOX case to the federal court as provided for by the Sarbanes-Oxley Act of 2002 and consolidate his claims against the Time Warner defendant companies.

9. The complaint (C.A. No. H-04-4188) filed with this Court on October 29, 2004 includes charges of accounting problems, irregularities, and manipulations affecting shareholders' interests.

10. The charges of accounting irregularities and financial and statistical manipulation are wide ranging and highly complex requiring a variety of experts and an extensive discovery process.

11. Due to the newness and complexities of the Sarbanes-Oxley law and the complexities of the 26 charges in the SOX complaint, Movant finds it difficult to obtain a competent attorney who is able and willing.

12. The protracted nature of the prior attorney's withdrawal has caused unexpected delays in obtaining replacement counsel.

13. Movant estimates it will take, at a minimum, ninety days to obtain replacement counsel and transition from the date of this motion.

14. The ninety day deferment and resetting of scheduling is also critical and necessary as a transition period for the new attorney on both Title VII and SOX charges.

WHEREFORE, PREMISES CONSIDERED, Plaintiff prays that the motion to defer proceedings for ninety days and reset scheduling upon Movant obtaining replacement counsel be granted.

Respectfully Submitted

sd/_____

Chandrashekhar "Chris" B. Thanedar
2435 Carianna Avenue
Mission, TX, 78572-1915
Telephone: 832-236-3558
PLAINTIFF
DATE: JULY 22, 2005

Copy to:

R. Michael Moore, defendants' attorney - sent by USPS mail.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CHANDRASHEKHAR B. THANEDAR	§	
	§	
Plaintiff,	§	
VS.	§	CIVIL ACTION NO.
	§	H-06-2139
TIME WARNER, INC., *et al*,	§	
	§	
Defendants.	§	

NOTICE OF TRANSFER

By agreement of the judges, this action is hereby TRANSFERRED to the docket of Judge David Hittner.

Deadlines and court settings remain in effect

Date: May 21, 2008 MICHAEL N. MILBY, CLERK

By: D. Palacios, Deputy Clerk

Appendix J